LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 12 1968
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1113

ALAN McSURELY, MARGARET McSURELY, SOUTHERN CONFERENCE EDUCATIONAL FUND, INC., THE NATIONAL CONFERENCE FOR NEW POLITICS, and VIETNAM SUMMER, *Appellants,*

and

JOSEPH MULLOY, *Intervenor,*

—against—

THOMAS B. RATLIFF, Commonwealth's Attorney for the 35th Judicial District, Pike County, Kentucky; PERRY A. JUSTICE, Sheriff of Pike County, Kentucky; GROVER ATKINS, Jailer of Pike County, Kentucky; and ROBERT L. MATTHEWS, Attorney General for the Commonwealth of Kentucky, *Appellees*

and

UNITED STATES OF AMERICA, *Intervenor.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY, PIKEVILLE DIVISION

JURISDICTIONAL STATEMENT

DAN JACK COMBS,
207 Carolina Avenue,
Pikeville, Kentucky.

ARTHUR KINOY,
WILLIAM B. KUNSTLER,
511 Fifth Avenue,
New York, New York, 10017.

MORTON STAVIS,
744 Broad Street,
Newark, New Jersey, 07102.

Attorneys for Appellants.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

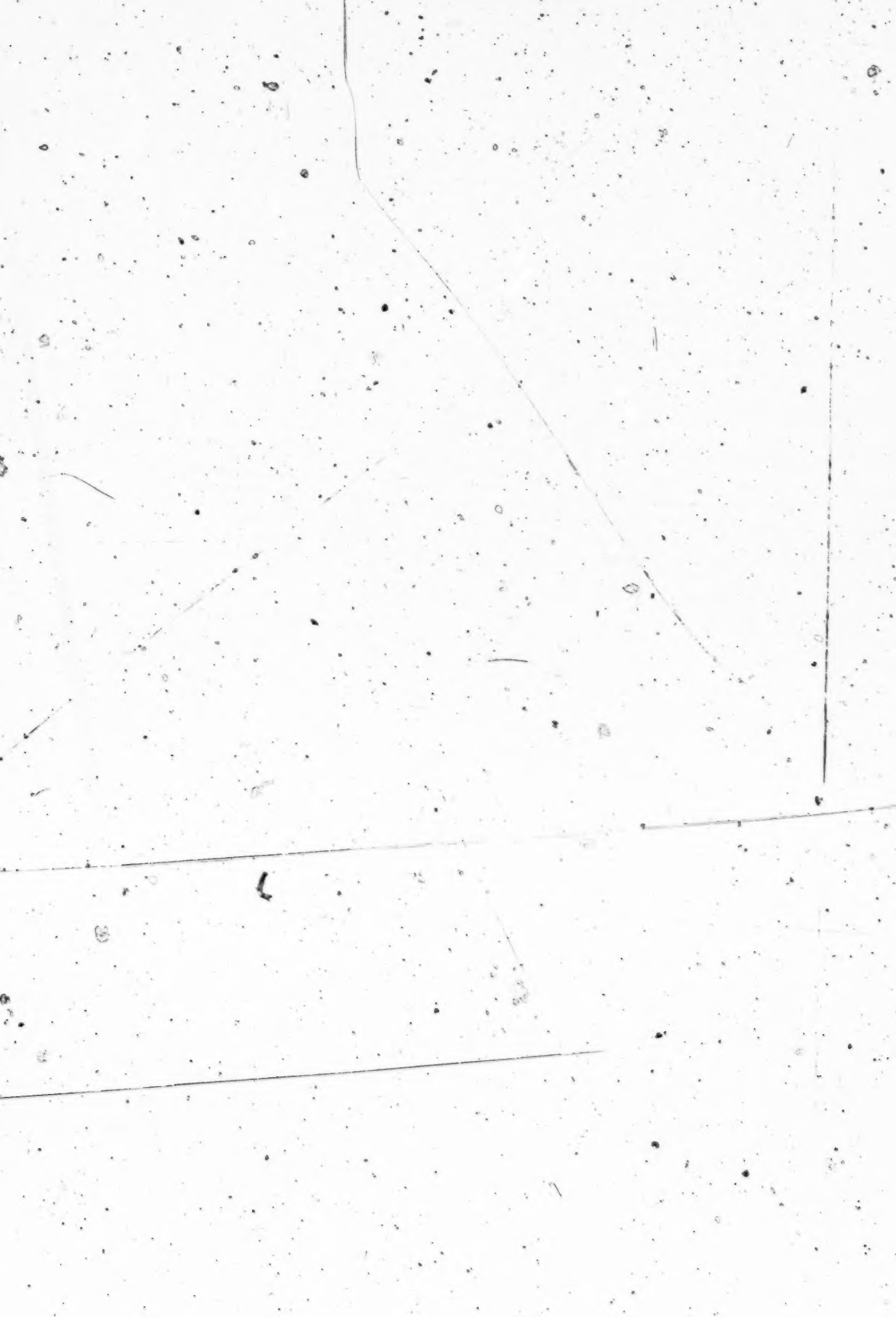

TABLE OF CONTENTS

	PAGE
THE OPINION BELOW	1
STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED	2
1. Nature of this proceeding	2
QUESTIONS PRESENTED BY THE APPEAL	7
STATEMENT OF THE CASE	9
I—Statement of the reasons why the questions presented are so substantial as to require plenary consideration	17
A. A Senate Subcommittee may not, consistent with the Fourth Amendment, have the assistance of a United States District Court to enforce a subpoena composed on the basis of information obtained from unauthorized inspection of illegally seized documents	17
B. The Fourth Amendment requires that, when a court determines that documents have been illegally seized, it should direct their return to the rightful owners thereof	20
C. Regardless of any aspect of illegal seizure, the within subpoenas, because of their indiscriminate sweep, are constitutionally intolerable under the Fourth Amendment	23
D. The subpoenas, by their search into membership and associational records, violate First Amendment rights	23

PAGE

E. The broad sweep of the associational attack renders the subpoenas void under the First Amendment 25

F. The resolution of the United States Senate does not authorize the subpoenas herein..... 27

G. Senate Resolution No. 150, adopted August 11, 1967, if read to authorize the within subpoenas, is void for its excessive delegation of legislative power..... 31

H. The subpoenas are not judicially enforceable, because 1) There is no resolution authorizing the specific inquiry; 2) The Committee did not authorize issuance of the subpoenas; 3) Neither the Committee nor the Senate has passed upon the objections to the subpoena 33

1. There is no resolution authorizing the specific inquiry..... 33

2. The Committee did not authorize issuance of the subpoena..... 34

3. Neither the Senate nor any Committee thereof has passed upon the objections to subpoenas 35

II—The three-judge court was properly convened; its jurisdiction upon being convened extended to all matters relating to the seized documents; and this Court has jurisdiction over this appeal 36

III—If the court does not have jurisdiction under 28 U.S.C. § 1253, it has jurisdiction by way of certiorari 38

CONCLUSION 39

PAGE

APPENDIX:

A—Final Order of the United States District Court for the Eastern District of Kentucky at Pikeville 1a

B—Order of the United States District Court for the Eastern District of Kentucky at Pikeville 4a

C—Order of the Supreme Court of the United States dated November 10, 1967 ..... 5a

D-1—Plaintiffs' Notice of Motion for Temporary Restraining Order 6a

D-2—Plaintiff's Motion for Issuance of an Order Directing the Return of all Material, etc. 9a

E—Inventory of the Material, Literature and all Objects Seized from the Plaintiffs in the above Styled Case 10a

F-1—Complaint in the United States District Court for the Eastern District of Kentucky at Pikeville 33a

F-2—Intervening Complaint in the United States District Court for the Eastern District of Kentucky at Pikeville 44a

G—Opinion of the United Sates District Court for the Eastern District of Kentucky at Pikeville 50a

H—Order of the United States District Court for the Eastern District of Kentucky at Pikeville 63a

I-1—Subpoena Re: Thomas B. Ratliff 66a

I-2—Subpoena Re: Alan McSurely 69a

PAGE

I-3—Subpoena Re: Margaret McSurely..... 70a

I-4—Subpoena Re: Archie Craft..... 71a

J—Motion of the United States for Leave to Appear as Amicus Curiae..... 72a

K—Notice of Appeal to the Supreme Court of the United States..... 73a

L—Objections to the Validity of Subpoenas Duces Tecum..... 74a

M—Plaintiffs' Motion for Evidentiary Hearing and Offer of Proof..... 80a

N—Motion of the United States to Intervene.. 98a

O-1—Stipulation of Facts..... 110a

O-2—Further Stipulation of Facts..... 118a

P—Notice of Appeal to the Supreme Court of the United States..... 119a

Q-1—Senate Resolution 150..... 120a

Q-2—Senate Resolution 53..... 122a

Q-3—Rules of Procedure for the Senate Permanent Subcommittee on Investigations, Readopted by the Full Committee on Government Operations..... 127a

R—Notice of Appeal to Court of Appeals for the Sixth Circuit..... 132a

Cases Cited

Allen v. Grand Central Aircraft Co., 347 U. S. 535 (1954) 7, 38

Barenblatt v. United States, 360 U. S. 109 (1959)..... 24

PAGE

Bates v. Little Rock, 361 U. S. 516 (1960) 23, 25, 32

Bibb County Board of Education v. United States, 88 S. Ct. 415 (1967) 7, 37, 38

Boyd v. United States, 116 U. S. 616 (1886) 22, 23

Burdeau v. McDowell, 256 U. S. 465 (1920) 22

Dombrowski v. Eastland, 387 U. S. 82 (1967) 18, 19

Dombrowski v. Pfister, 380 U. S. 479 (1965) 3, 30

Elkins v. United States, 364 U. S. 206 (1960) 18, 20

Florida Lime and Avocado Growers v. Jacobson, 362 U. S. 73 (1960) 7, 36

Geniviva v. Bingler, 206 F. Supp. 81 (W. D. Pa. 1961) 22

Gibson v. Florida Investigating Committee, 372 U. S. 539 (1963) 23-25, 28

Gojack v. United States, 384 U. S. 702 (1966) 33, 34

Hale v. Henkel, 201 U. S. 43 (1906) 23

Jones v. Securities and Exchange Commission, 298 U. S. 1 (1936) 28

Lee v. Bickel, 292 U. S. 415 (1934) 7, 38

Mapp v. Ohio, 367 U. S. 643 (1961) 21

Moody v. Flowers, 18 L. Ed. 2d 643 (1967) 38

NAACP v. Alabama, 357 U. S. 449 (1958) 23-25

Panama Refining Co. v. Ryan, 293 U. S. 388 (1935) ... 32

Railroad Commission of California v. Pacific Gas & Electric Co., 302 U. S. 388 (1938) 7, 36

Shelton v. Tucker, 364 U. S. 479 (1960) 26

PAGE

Shelton v. United States, 327 F. 2d 601 (C. A. D. C. 1963) 35

Slagle v. Ohio, 366 U. S. 259 (1961) 21, 35

Silverthorne Lumber Company v. United States, 251 U. S. 385 (1919) 17, 18

Stainback v. Mo Hock Ke Lok Po, 336 U. S. 368 (1949) 38

Stanford v. Texas, 379 U. S. 476 (1965) 23

Sterling v. Constantin, 287 U. S. 378 (1932) 7, 36

Sweezy v. New Hampshire, 354 U. S. 234 (1957) 32

Turner v. City of Memphis, 369 U. S. 350 (1962) 38

United States v. Bank of New York, 296 U. S. 463 (1935) 37

United States v. Robel, 88 S. Ct. 419 (1967) 26

United States v. Rumely, 345 U. S. 41 (1953) 29, 32

Watkins v. United States, 354 U. S. 178 (1957) 32

Wilson v. United States, 369 F. 2d 198 (C. A. D. C. 1966) 21, 33, 35

Zemel v. Rusk, 381 U. S. 1 (1965) 7, 37, 38

United States Constitution Cited

First Amendment 8, 9, 16, 19, 22-25, 29, 32

Fourth Amendment 7, 8, 19, 20, 23

Statutes Cited

K.R.S. 432.040 (Commonwealth's Anti-Sedition Law) 2

PAGE

2 U.S.C.:

Sec. 194 ..... 21, 33, 35

28 U.S.C.:

Sec. 1253 ..... 6, 37-39

Sec. 2281 36

Rule Cited

Rules of Procedure of the Permanent Subcommittee on Investigations of the Committee on Government Operations of the Senate:

1 33

2 34

Other Authorities Cited

Cong. Rec. S-11438, August 11, 1967 31

Senate Resolution No. 53 ..... 8, 9, 27

Senate Resolution No. 150 ..... 16, 27

IN THE

United States Court of Appeals

OCTOBER TERM, 1967

No.

ALAN McSURELY, MARGARET McSURELY, SOUTHERN CONFERENCE EDUCATIONAL FUND, INC., THE NATIONAL CONFERENCE FOR NEW POLITICS, and VIETNAM SUMMER, *Appellants,*

and

JOSEPH MULLOY, *Intervenor,*

—against—

THOMAS B. RATLIFF, Commonwealth's Attorney for the 35th Judicial District, Pike County, Kentucky; PERRY A. JUSTICE, Sheriff of Pike County, Kentucky; GROVER ATKINS, Jailer of Pike County, Kentucky; and ROBERT L. MATTHEWS, Attorney General for the Commonwealth of Kentucky, *Appellees*

and

UNITED STATES OF AMERICA, *Intervenor.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY, PIKEVILLE DIVISION

JURISDICTIONAL STATEMENT

The Opinion Below

The statutory three-judge federal District Court on December 13, 1967, entered a final order denying plaintiffs'

motion for an order enjoining the release to a Senate Subcommittee of books, papers, documents, and other materials which had been seized from them, and denying appellants' motion for an order directing the return of papers seized from them. The order is not reported and is set forth as Appendix A (1a). The District Court had made an earlier order on October 30, 1967, a copy of which is attached as Appendix B (4a). That order was the subject of an application for emergency relief to this Court. This Court's order of November 10, 1967 (Appendix C, 5a) stayed the operation of the October 30 order pending a determination of the issue remanded to the three-judge court. The order of December 13, 1967 following that remand, finalized the order of October 30 and is the subject of the within appeal.

The December 13 order finally disposed of the motions for a restraining order and for a turnover of documents made on October 18, 1967 (Appendices D-1 and D-2 hereto, 6a to 9a).

Statement of the Grounds on Which the Jurisdiction of This Court is Invoked

1. Nature of this proceeding:

On August 11, 1967, local and state authorities in the Commonwealth of Kentucky commenced a prosecution of appellants, Alan McSurely and Margaret McSurely and one Joseph Mulloy, members and representatives of civil rights and poverty organizations in Pike County, Kentucky, under the Commonwealth's Anti-Sedition Law (K.R.S. 432.040).

Pursuant to said prosecution, at midnight on August 11, 1967, the home of the McSurelys was raided and large quantities of documents, files, membership lists, correspondence, books and literature were seized under color of this state statute. The massive and oppressive quality of this

raid is best revealed by inspection of the inventory of seized documents, a copy of which is annexed as Appendix E (10a).

On August 16, a plenary federal action was instituted by the McSurelys and the Southern Conference Educational Fund (SCEF), the National Conference for New Politics, and Vietnam Summer (organizations employing Alan McSurely), seeking an injunction restraining the enforcement of this overly broad and unconstitutional anti-sedition statute and seeking the return of the seized documents and records. A copy of the complaint is annexed as Appendix F-1 (33a). Joseph Mulloy filed an intervening complaint likewise seeking an injunction against the prosecution (Appendix F-2, 44a).

On August 17 a three- judge federal District Court was duly convened to hear and determine the complaint.

On September 14 the three-judge court issued a permanent injunction under the authority of *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965) restraining the enforcement of the state statute and the pending state criminal proceedings thereunder. It did not, however, give final relief as to the documents which had been seized under the statute. It ordered instead that the documents and other seized material be kept in the custody of the Commonwealth Attorney, Pike County, Kentucky, pending a possible appeal by the defendants-appellees to this Court. The opinion of the District Court is attached hereto as Appendix G (50a); the order issued upon that opinion is attached as Appendix H (63a). No appeal was filed from the foregoing ruling of the United States District Court.

On October 16, before the expiration of the time for appeal from the order of September 14, the Commonwealth Attorney for Pike County, holding the documents afore-

said by order of the District Court, was served with a forthwith subpoena *duces tecum* from the Permanent Subcommittee on Investigations of the Committee on Government Operation sof the United States Senate (hereinafter referred to as the Subcommittee), to produce certain documents, materials and information broadly relating to the McSurelys and to membership and activities of more than thirteen civil rights and related organizations, some of which was claimed to be in the illegally seized materials. Identical subpoenas were also served upon the United States Marshal and the appellants McSurely. See subpoenas attached hereto as Appendices I-1, I-2, I-3, and I-4 (66a to 71a).

Appellants on October 18, 1967 filed the motions, above referred to, seeking the issuance of a temporary restraining order enjoining the release of the books, papers, documents, and other materials, pursuant to the aforesaid subpoena, and also a motion for an order directing the return to plaintiffs of said books, papers, documents, and other materials.

The United States at this point moved for leave to appear *amicus curiae* (Appendix J, 72a) and filed a memorandum in opposition to plaintiffs' motion.

On October 30 the three-judge District Court, without a hearing, denied appellants' said motion and ordered that the illegally seized documents be turned over to the Senate Committee and that appellants and their counsel "cooperate therewith" (Appendix B, 4a).

Notice of appeal to this Court was filed (Appendix K, 73a) and on application for emergency relief filed with this Court, this Court made its order dated November 10, 1967 (Appendix C, 5a) which stayed the October 30 order conditioned upon plaintiffs' filing with the District Court,

within five days, objections to the validity of the subpoenas.

Following the November 10 order of this Court, plaintiffs-appellants filed their objections to the validity of the subpoenas (Appendix L, 74a). Appellants thereafter filed their motion for evidentiary relief and offer of proof (Appendix M, 80a), to which there was attached an affidavit of James Dombrowski (96a). At the same time the United States filed a motion to intervene, to which was attached an affidavit by Senator McClellan and certain exhibits. A copy of said motion is annexed as Appendix N (98a). The Government's motion to intervene was granted. On December 1 the United States filed an opposition to the motion for an evidentiary hearing.

A hearing, which was in part evidentiary, was held on December 5. The parties filed two stipulations of fact, designated "Stipulation of Facts" (Appendix A-1, 110a) and "Further Stipulation of Facts" (Appendix O-2, 118a).

Under date of December 13 the District Court made its final order (Appendix A, 1a) which, without explanation or assignment of any reasons, ordered that the objections of the plaintiffs to the subpoenas be overruled, thereby reaffirming and making final its October 30 order denying plaintiffs' motion for the restraining order.

A notice of appeal, a copy of which is attached as Appendix P (119a), was filed from said order, and an application was thereupon made to this Court for emergency relief. On January 29, 1968, this Court made its order, as follows:

> The motion for relief presented to Mr. Justice Stewart, and by him referred to the Court, is granted and the order of the United States District Court for the Eastern District of Kentucky of December

13, 1967, is stayed to the extent that the seized documents shall remain in the custody of the Commonwealth's Attorney of Pike County, Kentucky, pending the perfection and disposition of the appeal by this Court.

This stay is conditioned upon the filing of the record, the jurisdictional statement and the docketing of the case within fourteen days from this date and should such appeal be docketed within that time, the Solicitor General is requested to respond to such jurisdictional statement within fourteen days thereafter. In the event the appeal is so docketed, this stay is to remain in effect pending this Court's ruling on the jurisdictional aspect of the case. Should the Court summarily affirm the judgment or dismiss the appeal, this stay shall automatically expire. In the event the Court notes probable jurisdiction or postpones consideration of the jurisdiction until the hearing on the merits, this stay is to remain in effect pending the issuance of the judgment of this Court.

Issuance of this stay in no way represents an adjudication that this Court has jurisdiction of an appeal from the order of the United States District Court hereby stayed.

The within jurisdictional statement is filed pursuant to the said order.

2. The judgment sought to be reviewed is dated December 13 and was filed December 14, 1967. Notice of appeal was duly filed on December 18 with the United States District Court for the Eastern District of Kentucky.

3. Jurisdiction of the appeal is conferred by Title 28, U.S.C. § 1253.

4. Cases sustaining the jurisdiction of this Court are: *Bibb County Board of Education* v. *United States*, 88 S. Ct. 415 (1967); *Zemel* v. *Rusk*, 381 U. S. 1 (1965); *Railroad Commissioners of California* v. *Pacific Gas and Electric Co.*, 302 U. S. 388 (1938); *Sterling* v. *Constantin*, 287 U. S. 378 (1932); *Florida Lime and Avocado Growers* v. *Jacobsen*, 362 U. S. 73 (1960); *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535 (1954); *Lee* v. *Bickel*, 292 U. S. 415 (1934).

Questions Presented by the Appeal

1. Whether, consistent with the Fourth Amendment or as a matter of judicial policy, the United States District Court, having custody of documents through an agent of the court, should affirmatively aid in the enforcement of a subpoena *duces tecum* of a Senate Subcommittee by denying a motion to enjoin transfer of the documents by such court agent, and by directing such court agent to comply with such subpoena, where it appears that the subpoena was composed on the basis of information obtained by an agent of the said Subcommittee through inspection of documents known by said agent to have been illegally seized by state officials, such inspection having been without the knowledge or authority of the owners of the documents?

2. Whether, consistent with the Fourth Amendment or as a matter of judicial policy, a United States District Court having temporary custody of documents which it has determined were illegally seized by state officials, should under any circumstances deny a motion to enjoin transfer of the documents and order the turning over of the documents or copies thereof to a Senate Subcommittee in response to a subpoena *duces tecum* served upon the persons holding such documents for the court, instead of directing their return to the owners of the documents from

whom they were illegally seized, there being no showing that the owners of the documents would not be subject to the normal process of subpoena?

3. Whether, consistent with the Fourth Amendment, a subpoena *duces tecum* issued by a Senate Subcommittee is enforceable by the United States District Court if, without identifying or designating any documents, it demands production "of all books, records, correspondence, documents and other papers which relate to or are concerned with" "membership in" or "employment by" or "activities of" some thirteen named organizations and all "Marxist Leninist Organizations"?

4. Whether, consistent with the First Amendment, a subpoena *duces tecum* issued by a Senate Subcommittee is enforceable by the United States District Court if it seeks membership and other records of thirteen organizations engaged in wide-ranging political activities where there is no showing that the organizations are anything other than entirely legitimate groups relying upon First Amendment free speech rights to carry out their programs?

5. Whether, consistent with the First Amendment, a subpoena *duces tecum* issued by a Senate Subcommittee is enforceable by the United States District Court if it broadly reaches into First Amendment associations and activity clearly beyond the reach of the subpoena power of the Senate, and the subpoena intermingles therewith an inquiry into non-First Amendment activity?

6. Does Senate Resolution No. 53 directing the Senate Subcommittee on Government Operations to make "a full and complete study and investigation of riots" authorize a subpoena *duces tecum* seeking wide-ranging records of membership and activities of some thirteen organizations

engaged in a variety of First Amendment activities where there is no showing that the organizations were engaged in rioting and no showing that the owners of the documents were engaged in rioting?

7. Is Senate Resolution No. 53 void for overbreath or by reason of unlimited delegation of the legislative power to investigate?

8. Under the facts of this case, should the United States District Court deny the injunctive relief sought by appellants and direct the turning over of subpoenaed documents to the Senate Subcommittee notwithstanding the objection of the orders thereof where it appears that (a) the investigation purportedly undertaken by the agents of the Subcommittee was not authorized by any resolution of the Subcommittee although the Subcommittee rules require such authorization, (b) the issuance of the subpoena was not directed or approved by the Subcommittee, and (c) the objections of the owners of the documents were not passed upon or considered by either the Subcommittee or the United States Senate?

Statement of the Case

The facts as stated in the District Court's opinion of October 18, 1967, quite fully set forth the onset of this case, as follows (50a):

> Alan and Margaret McSurely, husband and wife, are field organizers for plaintiff Southern Conference Educational Fund, Inc., in Pike County, Kentucky. Alan McSurely is also a field organizer for the National Conference of New Politics and has distributed literature of Vietnam Summer, both uncorporated associations and both plaintiffs here. Joseph Mulloy is a field representative for the Appalachian Volunteers, an organization funded pri-

marily by the United States Office of Economic Opportunity. According to the McSurelys and Mulloy, their official duties are to investigate the socio-eco-political milieu of Pike County, "to inform the people of their rights," and to help local citizens "organize to overcome their problems."

Anne and Carl Braden, husband and wife, are directors of the Southern Conference Educational Fund.

On the night of August 11, 1967 under authority of warrant charging seditious activities against the United States and the Commonwealth of Kentucky in violation of KRS 432.040, officials of Pike County and their deputies arrested the McSurelys and Mulloy. The officials also seized and impounded 564 loose books, twenty-six posters, and twenty-two boxes of books, pamphlets, and other private and published documents found in the McSurely home. They also impounded a suitcase of clothes and several personal items which were caught up in the whirlwind of the search.

It will be observed that the seizure was from the McSurelys' home but it is obvious from an inspection of the inventory that while some of the documents were personal others were related to their employment by the plaintiff SCEF and the other organization plaintiffs (10a; *et seq.*).

Following the filing of the complaint and the seizure of documents above referred to, a hearing was had before the United States District Court which resulted in the court's opinion that the statute was unconstitutional. The specific language of the court in this respect was that "it is difficult to believe that capable lawyers could seriously contend that this statute is constitutional" (58a).

Accordingly, the District Court ordered that enforcement of the statute be restrained. As to the remaining portion of the relief originally sought, namely, the return of the documents, the following order was made:

> "It is further ordered that all books, papers, docments and other material now in the custody of the Commonwealth Attorney of Pike County, Ratliff, reflected by the Inventory filed in this action continue to be held by him in safe keeping until final disposition of this case by appeal or otherwise." (64a)

Subsequent to this order of the District Court, the following transpired ("Stipulation of Facts" and "Further Stipulation of Facts", Appendices O-1 and O-2 (110a to 118a):

Laverne Duffy, assistant counsel to the Senate Subcommittee, telephoned Mr. Ratliff, who is the defendant in this case and who had possession of the documents pursuant to the order of the court, to ask if Mr. Ratliff had the material in his possession (110a). Mr. Ratliff advised him that he did. (*ibid.*). Thereafter, on October 8, 1967, John Brick, an investigator for the Subcommittee, visited the defendant Ratliff and one Thaddeus Scott, a Commonwealth Detective, and made inquiries as to the content of the seized material, specifically, whether the material had any information relating to various organizations, and Mr. Ratliff responded to his inquiries (110a). Thereafter, on the same day, Mr. Ratliff called on Mr. Brick at his motel and subsequently Mr. Scott delivered to Mr. Brick a number of manila folders containing xerox copies of some of the documents which Mr. Ratliff was supposedly holding in his safekeeping by order of the District Court (111a).

The following morning Mr. Brick went to the Pike County Court House, returned the materials which had been given to him the night before, and was then permitted by Mr. Ratliff's assistant to examine the seized material (112a). On October 12, Mr. Brick returned to Pikeville and again was permitted to examine the seized material for four hours (*ibid.*). Copies of some of the seized documents were made available to Mr. Brick and are presently in the possession of the Senate Subcommittee (118a).

There was no doubt that Mr. Brick knew of the orders of the United States District Court and the terms under which Mr. Ratliff was holding the documents; on October 9 he examined the file in the United States District Court (112a). The District Court's order impounding the documents is dated September 14.

Thereafter Mr. Brick returned to Washington and prepared the subpoenas involved in this case (112a). It is conceded that among the sources of information used by Mr. Brick in preparing the subpoenas was "information acquired by examination of the seized materials" (118a), although Mr. Brick would also claim that he used certain other information, some of which he would not disclose and some of which, without further identification, "has now been made public in the McClellan Committee hearings" (118a). It was after the service of the subpoenas by Mr. Brick that plaintiffs made their motion for a restraining order and injunctive relief, thereby seeking a decision in respect to that aspect of their original complaint which the District Court had held in limbo.

At the hearing before the District Court, the Government made certain stipulations as to the numerous organizations named in the subpoenas, "without admitting the validity or inclusiveness thereof, the United States is will-

ing to stipulate that representatives of the organizations listed in the subpoenas involved herein would testify, if called, that the purposes and programs of their organizations are as set forth in the complaint filed herein and/or the Plaintiffs' Motion for an Evidentiary Hearing and Offer of Proof." (118a)

That testimony—and while the Government has not admitted its validity or inclusiveness, it has in no way disputed it and there is not a shred of countervailing testimony—is as follows (81a):

> a) Southern Conference Educational Fund, Inc., is a corporation organized under the laws of the State of Tennessee, domesticated and maintaining an office for business purposes in the Commonwealth of Kentucky, whose purpose is to help to secure to black and white. American citizens the rights guaranteed to them under the Constitution of the United States and to end all forms of racial and economic segregation, discrimination and injustice in the interest of both black and white citizens of the Southern states.
>
> b) Vietnam Summer is an unincorporated association, maintaining an office for business purposes in the Commonwealth of Massachusetts. It is designed to reach out to millions of Americans deeply troubled by the War in Vietnam, to find concerned men and women in the communities and neighborhoods across the nation, and to weld them into an organization and active constituency.
>
> c) Mississippi Freedom Democratic Party is an unincorporated association maintaining an office for the conduct of business in the State of Mississippi. It is a political party open to membership by all who support its platform, programs, purposes and

activities without regard to race or color although it is presently composed of black citizens of the State of Mississippi. MFDP seeks to attain its primary goal of freedom and equality for all black citizens of Mississippi by political organization, activities and programs directed thereto. In order to achieve freedom and equality for all Mississippians, irrespective of race, it utilizes the rights of freedom of speech, press, association and assembly and to petition for the redress of grievances, all of which are guaranteed by the First Amendment to the Constitution of the United States.

d) National Conference for New Politics is an unincorporated association maintaining office for business purposes in the City and State of New York. Its primary purpose is to further and advance the growth of a new politics throughout the United States, a politics of ordinary people who want to control democratically the decisions that effect their own lives. In furtherance of its objectives, programs and purposes, NCNP employs and engages in activities which are protected by the rights of freedom of speech, press, association and assembly and to petition for the redress of grievances, all of which are guaranteed by the First Amendment to the Constitution of the United States.

e) Southern Student Organizing Committee is "an association of young, concerned southerners dedicated to social change" through exercise of protected First Amendment rights to achieve a more representative democratic society. Its principal office is in Nashville, Tennessee.

f) Progressive Labor Party is a radical political party which engages in recognized political activi-

ties, such as running candidates for office and holding conventions and drafting platforms for their political campaigns. Its principal headquarters are in New York, New York.

g) Student Nonviolent Coordinating Committee is an unincorporated association maintaining an office for business purposes in the City of Atlanta, Georgia, and whose purpose is to help to secure to all Negro citizens the rights guaranteed to them under the Constitution of the United States, and to end all forms of racial segregation and discrimination in the interest of Negro and white citizens throughout the United States. In support of these purposes SNCC, its staff and supporters engage in all forms of legitimate peaceful activities, including, but not limited to picketing, demonstrations, rallies, mass meetings, voter registration drives, community organization and publication. SNCC seeks to obtain its objectives through utilization of the fundamental rights of free speech, press and assembly, and the right to petition the government for the redress of grievances.

h) United Planning Organization is an umbrella anti-poverty agency for Washington, D. C. It is the primary funding agency for all community action projects in Washington, D. C.

i) Appalachian Volunteers is an Office of Economic Opportunity project, staffed by VISTA volunteers to work among the poor in the Appalachian Mountain which are located in the States of Kentucky, Virginia and West Virginia.

j) Action Coordinating Committee to End Segregation in the Suburbs is a private civil rights or-

ganization founded in March, 1966, by Alan McSurely. Its purpose is to end segregation in the Washington, D. C. suburbs. Its headquarters are in Washington, D. C.

k) Jobs Or Income Now is a Students for Democratic Society project funded by private donations and contributions and in operation in the cities of Baltimore, Maryland, and Chicago, Illinois. It is a community action project intended to raise the economic standard of the disadvantaged people in those cities.

l) Students for Democratic Society is a group of students organized nationally for the purpose of bringing about fundamental changes in the democratic institutions of American society through social and political action through the exercise of protected First Amendment rights. Its principal headquarters are in Chicago, Illinois, and it has local chapters on campuses of colleges and universities throughout the nation.

All of the organizations named utilize First Amendment freedoms to attain their objectives (86a).

With respect to the functioning of the Senate Subcommittee, the following should be noted. The Senate adopted Resolution No. 150, on August 11, 1967, following a recommendation of the Subcommittee. Senator McClellan as chairman of the Committee did on August 12 purport to delegate to the Subcommittee the powers of the Committee under Resolution No. 150. Significantly, there is no proof that (a) the Subcommittee took any action following the adoption of Resolution No. 150 to authorize any particular investigation, let alone an investigation of the McSurelys; (a) there is no proof that any person or body

authorized the issuance of the subpoenas here served other than the chairman, Senator McClellan; (c) there is no proof that, after it developed that the subpoenas were being opposed by the McSurelys, the Subcommittee, the Committee, or the Senate passed upon or even considered the opposition to the subpoenas. In essence there is no proof that the appearance by the Department of Justice in the instant case in an effort to sustain the subpoenas was prompted by any official action of the Senate or any committee or subcommittee thereof.

I

Statement of the reasons why the questions presented are so substantial as to require plenary consideration.

The unusual posture of the proceedings in this case has produced an extraordinary number of important questions of constitutional law, some of great novelty and others involving issues as to the more specific application of principles enunciated by this Court in related cases. We will set forth below in respect to each of the questions presented a brief outline of the constitutional issues from which their substantiality will readily appear.

A. A Senate Subcommittee may not, consistent with the Fourth Amendment, have the assistance of a United States District Court to enforce a subpoena composed on the basis of information obtained from unauthorized inspection of illegally seized documents.

Ever since Mr. Justice Holmes' opinion in *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385 (1919), it has been clear that information obtained through an illegal seizure may not be a basis for a subsequent subpoena. In that case the Court said:

> The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the government can gain over the object of its pursuit by doing the forbidden act. 251 U. S. at 391.

We assume that by analogy to *Elkins* v. *United States*, 364 U. S. 206 (1960), the principles in *Silverthorne* would be equally applicable to the illegal search which was made by state officials and the subpoena composed by federal officials. The issue posed by this case is the application of the principles of *Sliverthorne* to a congressional subpoena. Because the pattern of this case—a subpoena following an unauthorized and surreptitious inspection of illegally seized documents—repeats the same pattern that this Court saw in *Dombrowski* v. *Eastland*, 387 U. S. 82 (1967), a firm adjudication by this Court on these questions is necessary.

The unusual feature of this case is that the Senate Subcommittee is literally seeking the positive assistance of the United States District Court in the implementation of its subpoena. The documents are clearly in *custodia legis;* the District Court has already determined that they were illegally seized; they were inspected without approval of the court; a subpoena was composed on the basis of the information so obtained; and now the Subcommittee wishes the court to lend its hand to the Subcommittee by turning the documents over to it rather than to their rightful owners.

While in some respects the pattern is the same as that seen in the *Dombrowski* v. *Eastland* case, *supra*, the need for relief in this case is even clearer than it was in *Eastland*.

In the *Dombrowski* case, as indeed in this case, documents were seized under a facially unconstitutional statute. In *Dombrowski* they were surreptitiously and *in toto* turned over to the Senate Committee; here agents of the Senate Committee have had only a preliminary view of the material. At least in *Dombrowski*, when the Senate Committee obtained the illegally seized documents, there had not been a prior decision of a federal court declaring the documents to be illegally seized. Here the case is stronger because at the very time agents of the Senate Committee inspected the documents, the seizure had already been judicially determined to be illegal and the agents of the Committee thus knew they were intruding into the private papers then in the hands of state officials whose actions in seizing them had been determined to be unlawful.

In *Dombrowski* v. *Eastland*, the documents went over to the Committee without the knowledge of the owners of the documents, making injunctive relief not possible. The only realistic remedy in that case was an action for damages, the legal basis of which this Court sustained in its opinion in *Dombrowski* v. *Eastland*, *supra*.

Here, the injunctive remedy which the plaintiffs seek can prevent the violation of rights. If ever there was a case for equitable relief, as distinguished from relegating plaintiffs to an action for damages, this is the case. For at issue is much more than the rights of individuals; at issue is the much larger question as to whether citizens shall be deprived of their right to resist massive legislative invasion of First and Fourth Amendment rights by

a new scheme which seems to be unfolding: A raid is conducted; documents are illegally seized; agents of a legislative committee obtain access to the documents without knowledge of the owners thereof and while they are in the very midst of resort to judicial procedures to obtain a return of the documents. And then a subpoena emerges—after most of the damage of the illegal seizure has been done—and the subpoena is of course based upon the very knowledge illegally obtained. Such a reward for participation in the fruits of illegality is contrary to the consistent line of decisions by this Court barring use of illegally seized documents without regard to whether the illegal seizure was by state officials and the attempted use was by federal officials, and equally without regard to whether the governmental body seeking to use the illegally seized documents participated in the seizure. *Elkins* v. *United States, supra.*

B. The Fourth Amendment requires that, when a court determines that documents have been illegally seized, it should direct their return to the rightful owners thereof.

Even if the Senate Subcommittee had not examined the documents and had not used the information gleaned therefrom to compose its subpoena, there remains the question as to whether, consistent with the Fourth Amendment, a subpoena *duces tecum* may validly be served to produce documents which have been unlawfully seized by State officials, without their first being returned to the person from whom they were seized. A further question under the Fourth Amendment is whether the service of a subpoena in such a situation may be the basis for depriving the owners of any of their rights under the Fourth Amendment.

For years this Court has been enunciating the principle that law enforcement officers may not benefit from their violation of law and specifically from illegal seizures. *Mapp* v. *Ohio*, 367 U. S. 643 (1961). The whole scheme of this subpoena served upon Mr. Ratliff is to deprive the owners of the documents of rights they have to resist the subpoena.

Firstly, it should be observed that the McSurelys themselves have been served with subpoenas and they are subject accordingly to whatever may be the legal thrust of those subpoenas. They are not outside the jurisdiction and they are subject to all the processes of the law.

But as witnesses subpoenaed before a Senate Subcommittee, the McSurelys would have a whole range of substantive and procedural rights which it is sought to deny to them by the procedures here employed. It should be noted that the Senate Subcommittee has no power of seizure; it has only a power of subpoena. Accordingly, a witness holding documents is not required forthwith on subpoena to surrender them or permit the subpoena server then and there to inspect the documents. He may be required to attend a committee hearing with his documents. Upon being asked to produce any particular document, he may raise a question with respect thereto and insist upon a ruling of the committee, *Slagle* v. *Ohio*, 366 U. S. 259 (1961), and the committee would have to pass on the question. If his objection is overruled and he should determine to resist the committee's subpoena, he still has a political remedy. He will not be subject to prosecution under 2 U.S.C. §194 unless the Senate certifies the matter to the Department of Justice, *Cf.*, *Wilson* v. *United States*, 369 F. 2d 198 (C. A. D. C., 1966).

Thus an entire range of rights of an owner of documents is sought to be swept aside by the extraordinary

procedure of serving a subpoena upon an agent of the court whose only reason for having temporary custody of the documents is that the court has already decided that the documents were seized illegally. It is true that appellants have been able to raise certain questions as to the validity of the subpoenas in this proceeding, *e.g.*, that they were composed as a result of inspection of illegally seized documents, that they are overbroad, and that they violate First Amendment rights. However, the remedies outlined above including the political remedies before the Senate, would be denied if the Court were to sustain the procedure in this case.

Even if documents could be subpoenaed in the hands of a thief, *Burdeau* v. *McDowell*, 256 U. S. 465 (1920), they could not be subpoenaed in the hands of an official who had seized the documents in violation of Fourth Amendment rights or a court agent holding them for the court after a determination of illegal seizure. The entire basis of *Burdeau* was that the thief's action did not represent governmental authority. *Cf.*, *Geniviva* v. *Bingler*, 206 F. Supp. 81 (D. D. Pa., 1961).

A seizure, or a subpoena *duces tecum* which has similar effect (*Boyd* v. *United States*, 116 U. S. 616 (1886)), upon documents illegally seized and not yet restored to the owners, cuts off rights under the Fourth Amendment before they have been fully vindicated. To condone a seizure-upon-seizure, so to speak, would be contrary to a consistent policy of this Court not to reward law enforcement officers who break the law, by depriving their victims of rights they would otherwise have.

C. Regardless of any aspect of illegal seizure, the within subpoenas, because of their indiscriminate sweep, are constitutionally intolerable under the Fourth Amendment.

The subpoenas are in eight paragraphs; they seek in catch-all language "all books, records, correspondence, docments and other papers which relate to or are concerned with", without identifying a single paper. They seek such records with respect to "membership in" or "employment by" and in some cases "activities of" some 13 identified organizations plus whatever unspecified number of organizations may be deemed to be included within the phrase "Marxist-Leninist organizations".

Subpoenas are of course subject to the same constitutional standards as are warrants for seizure. *Hale* v. *Henkel,* 201 U. S. 43, 76 (1906); *Boyd* v. *United States,* 116 U. S. 616, 622 (1886). The subpoenas in this case are plainly inconsistent with the decision of this Court in *Stanford* v. *Texas,* 379 U. S. 476 (1965). There a broad, sweeping subpoena into the records of the Communist Party of Texas was held to be constitutionally intolerable. The language of the warrant in the *Stanford* case was remarkably similar to that here used, with one significant difference. Here the records of 13 identified organizations are involved and an untold number of unnamed organizations. At least in the *Stanford* case only one organization was involved.

D. The subpoenas, by their search into membership and associational records, violate First Amendment rights.

In a line of cases beginning with *NAACP* v. *Alabama,* 357 U. S. 449 (1958), and including *Bates* v. *Little Rock,* 361 U. S. 516 (1960), and *Gibson* v. *Florida Investigating Committee,* 372 U. S. 539 (1963), this Court has protected

from the prying eyes of executive or legislative committees membership records of dissident organizations espousing unpopular views. The Court has recognized that "inviolability of privacy in group association may in many circumstances be indispensible to preservation of freedom of association, particularly where a group espouses dissident beliefs", *NAACP* v. *Alabama, supra,* at 462. And in *Gibson, supra,* the Court again noted the "'chilling' effect on the free exercise of constitutionally enshrined rights of free speech" (372 U. S. at 556) of intrusions into privacy of associational relationships or organizations espousing unpopular beliefs.

Here, without explanation or attempted justification, membership records of some 13 organizations are demanded.

In *Gibson,* the Court in distinguishing cases such as *Barenblatt* v. *United States,* 360 U. S. 109 (1959), emphasized that a rigorous factual showing would be required to show a connection between the organization there involved and the Communist Party, before the right of associational privacy would be surrendered. In the instant case there was not even an attempt to introduce any such evidence and indeed there is absolutely nothing in the record to dispute the Government's own stipulation (118a) that if called to testify the organizations would describe their objects and purposes as set forth in plaintiffs' offer of proof, which establishes each of the organizations to be an entirely legitimate body relying upon First Amendment free speech rights to carry out its program.

In his memorandum opposing the application for emergency relief, the Solicitor General said:

> While it is true that items (2) and (5) of the subpoenas are drafted in a manner which could en-

> compass more than the activities of the appellants in the various organizations listed therein, we have been informed by the Subcommittee that these two items—(2) and (5)—were intended to call for production of the records of the named organizations only to the extent that they related to the membership, employment or activities of appellants in these organizations and that compliance with the subpoena as so limited will be considered full compliance.

It is a novel suggestion that an overly broad subpoena may be saved by this type of modification by the Solicitor General before this Court. But that problem aside, the decisions of this Court in *Bates, Gibson,* and *NAACP* protecting associational privilege are not limited to cases where the total membership list of an organization is sought. They are equally applicable to unwarranted exploration into the associational relationships of a single individual.

E. The broad sweep of the associational attack renders the subpoenas void under the First Amendment.

There have indeed been cases where the Court has found a valid governmental interest which has sustained some limited intrusion into First Amendment rights. In such cases, the Court must consider the claim of legislative purpose and whether it outweighs the interest of the individual and society in the uninhibited exercise of the right of association.

The *sine qua non* of any claim that the government may, by reason of a particular situation, intrude upon First Amendment rights is that the governmental action be narrow and precise. Broad, sweeping attacks upon First Amendment rights can never be sustained, regardless of the claim of governmental interest.

In *Shelton* v. *Tucker,* 364 U. S. 479 (1960), the Court held that the State had a valid legislative purpose in its inquiry, but that its means were abusive and unnecessary, and therefore invalid.

Most recently the Court repeated this concept in *United States* v. *Robel,* 88 S. Ct. 419 (1967), when it pointed out that, when governmental action operates within the First Amendment area, it may not properly include within its scope that which may not be sanctioned with that which may be sanctioned.

In the light of the foregoing principles we observe that the sole argument made by the Solicitor General seeking to sustain the subpoenas in his opposition to the application for emergency relief was that the Senate Subcommittee had information that certain members of SNCC may have participated in the Nashville riot which began on April 8, 1967 and that the McSurelys were present at a meeting of the Southern Conference Education Fund (SCEF) which was held in Nashville on April 5-6, 1967.

In order to eliminate the mystery relating to these matters, there was introduced at the trial below the minutes of the meeting attended by the McSurelys (see minutes attached to Stipulation of Facts, 114a). It develops that the meeting was nothing but a semi-annual meeting of the Board of Directors of SCEF (114a). The meeting was held at the Methodist Board of Evangelism Building, it opened and concluded with a prayer, it considered a wide range of business of the organization. At one point in the meeting Mr. Carmichael, who was in Nashville to speak at Vanderbilt University, appeared and explained his point of view (minutes, 115a). The officers and directors of SCEF (and the McSurelys were not even that; they were no more than staff employees) were no more involved in pre-riot plan-

ning than were the officials of Vanderbilt University who invited or permitted Mr. Carmichael to speak and expound his views.

Regardless of the content of the meeting, our point here is a very simple one and that is that, assuming *arguendo* without in any way conceding that paragraph 1 of the subpoenas could have been justified, *i.e.*, an inquiry into meetings attended by the McSurelys in Nashville, there is nothing that would sustain the broad associational inquiry which the remainder of the subpoenas reflects.

The broad sweep of the subpoenas—the references to thirteen organizations—most of which are clearly unrelated to any matter within the possible interest of the Senate Committee—necessarily invalidates the supoenas herein.

F. The resolution of the United States Senate does not authorize the subpoenas herein.

The claim of authority for the subpoenas is Senate Resolution No. 150 adopted August 11, 1967, which amended Resolution No. 53 by adding, among others, the following paragraph:

> Sec. 5. The Committee on Government Operations or any duly authorized subcommittee thereof is authorized and directed until January 31, 1968, to make a full and complete study and investigation of riots, violent disturbances of the peace, vandalism, civil and criminal disorder, insurrection, the commission of crimes in connection therewith, the immediate and longstanding causes, the extent and effects of such occurrences and crimes, and measures necessary for their immediate and long-range prevention and for the preservation of law and order and to insure domestic tranquillity within the United States.

Apparently the Senate Committee considers the subpoenas to be authorized upon the theory that it is making a full and complete study and investigation of riots, etc. But what does this subpoena have to do with such an investigation? Except for the first paragraph of the subpoena, riots or civil disturbances are not even mentioned, and even in respect to the first paragraph, there is not a hint that plaintiffs, or any of them, were actually involved with civil disturbances or riots.

The first paragraph of the subpoena by its phrasing seeks to infer participation in a "pre-riot" meeting. In fact, the Government has now stipulated the minutes of the meeting, which show it to have been entirely innocent.

The intention of the Senate resolution on its face and in the light of the debates is to authorize legitimate inquiry into the underlying causes of the violent civil disorders recently occurring in the ghetto neighborhoods of the major urban centers. However, this resolution does not authorize, nor was it intended to authorize, a "fishing expedition," *Jones* v. *Securities Commission,* 298 U. S. 1, 26 (1936), of *bona fide,* legitimate, political and social action organizations such as those which employ plaintiffs.

The records and documents of the plaintiffs regarding their association with valid political action groups such as NCNP and Mississippi Freedom Democratic Party, social action groups such as SCEF, SNCC, JOIN, and SSOC, and OEO programs such as Appalachian Volunteers, and ACCESS, are beyond the scope of this Committee's express authority.

Nor has there been even an attempt to show any " 'nexus', 'foundation' or whatever . . . between the information sought", *Gibson* v. *Florida Investigating Committee, supra,* at 546, and the investigation of the Committee—

a "nexus" of decisive importance where First Amendment rights are intruded upon (*ibid.*).

Upon the subpoenas and the record made in this case—including the stipulations as to the program and purposes of the various organizations—how can one seriously contend that investigation into the membership and association of approximately a dozen organizations can reasonably be related to an investigation into riots and civil disturbances? Does anyone believe for a moment that an inquiry into employment by the Appalachian Volunteers is related to riots? What relationship to the riots can be found the employment records of the United Planning Organization—a Washington, D. C. central anti-poverty organization? And if one is concerned with riots or civil disturbances, what is the relevance of membership lists of Vietnam Summer, which was a summertime organization in 1967 opposing the Vietnam War? Precisely the same question may be put as to the National Conference for New Politics which is purely a political organization, or as to the Freedom Democratic Party of Mississippi, which has been running candidates for election in Mississippi. The question may indeed be put to every one of the identified organizations in the subpoenas.

Having in mind that the supboenas trench upon First Amendment rights, the teaching of *United States* v. *Rumely*, 345 U. S. 41 (1953), is that the resolution must be narrowly read to avoid precisely the kinds of constitutional issues which these subpoenas present.

It is obvious that the Senate Committee has taken its resolution as authorizing a general broadside investigation into the membership, affiliations, and opinions of a broad spectrum of the political life of the United States. The subpoenas show the Committee reaching into a substantial

number of organizations devoted to advocacy of points of view in the fields of peace, civil rights, assistance to the poor, etc. The Committee is not searching for information; the Committee is trying to destroy those who may have views which vary from the views of the Committee. This the Committee may not do; the resolution does not authorize it; and if it did, a serious quesion as to the validity of the resolution would be presented.

We learn from *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965), that free expression is "of transcendent value to all society" (at 486) and that in order to prevent the "chilling effect upon the exercise of First Amendment rights" this Court would enjoin prosecution under a facially unconstitutional statute which threatens First Amendment rights.

But the "chilling effect" of a state court prosecution is no match for the power of a Senate Subcommittee with all the benefits of nationwide publicity through television, radio and newspapers. If such a Committee is permitted by subpoena to obtain membership lists not only of SCEF (a litigant in *Dombrowski*) but every other politically dissident organization which it can name, is not the chilling effect on these organizations and their adherents obvious?

This Court hardly needs a reminder of the chilling pall upon the whole body politic of the actions of this very Subcommittee when it was under other leadership a little less than two decades ago. The subpoenas served here are a warning that unless promptly curbed by this Court, the Committee will regress in the direction of a program which the American people hoped they would never again experience.

G. Senate Resolution No. 150, adopted August 11, 1967, if read to authorize the within subpoenas, is void for its excessive delegation of legislative power.

If the Resolution can be read to authorize the within subpoenas, then it can be read to include anything within the imagination of any subpoena draftsman. But in that case, a serious question of delegation of power is necessarily presented.

It may well be that this Committee will contend that it has unlimited power. Senator McClellan made it clear during the debate on the floor of the Senate that he sought to avoid any possible limitations of power. He said, in fact—

> One of the biggest difficulties we have run into, both in the House and in the Senate, when conducting an investigation, is that when you stipulate some of the things you are going to investigate, you may fail to include one. The sharp lawyers who come before us representing witnesses then challenge our authority and jurisdiction.
>
> By the generalized terms in the pending resolution, however, we omit nothing.

Earlier he said:

> As far as I am concerned, I want the investigation as broad and inclusive as language can make it, and this language does it.
>
> Cong. Rec. S 11438, 8/11/67

There is a very serious question as to whether any governmental unit, even the United States Senate, has the power to adopt a resolution so broad that there are no limitations upon the authority of its committee. Granted that the Senate has the power to investigate; granted that it may

delegate such power, it is doubtful that its degelation can be so broad that it is unlimited. "It is the responsibility of the Congress, in the first instance, to assure that compulsory process is used only in furtherance of a legislative purpose." *Watkins* v. *United States,* 354 U. S. 178, 201 (1957). And the Court continued by stating that "[responsibility] requires that the instructions to an investigating committee spell out that group's jurisdiction and purpose with sufficient particularity." *Ibid.*

We submit that the Senate may not validly empower a committee to investigate with subpoena power anything the committee in its discretion wants to investigate. There are four powerful reasons why such an authorization must fail: a) it would eliminate judicial review of authorization, *cf., United States* v. *Rumely, supra;* b) it would virtually eliminate judicial review of pertinency, *cf., Watkins* v. *United States, supra;* c) it would constitute an improper delegation of Congressional authority, an abdication by Congress of one of its basic functions, *cf., Panama Refining Co.* v. *Ryan,* 293 U. S. 388 (1935); and d) it would eliminate judicial review of First Amendment challenges by failing to give the court a deliberate legislative judgment that the state needs the particular information the committee seeks to compel from the witness. Thus, the court would be deprived of a basis for determining how the Senate's needs and interests could rationally be balanced against those of the witness. *Cf., Sweezy* v. *New Hampshire,* 354 U. S. 234 (1957); *Bates* v. *Little Rock, supra.*

The choice then is to read the resolution narrowly and avoid obvious constitutional questions, or to view the resolution as so broad that it has no limits. Upon the first approach the subpoenas are not authorized; upon the second the resolution itself is invalid.

H. The subpoenas are not judicially enforceable, because 1) There is no resolution authorizing the specific inquiry: 2) The Committee did not authorize issuance of the subpoenas: 3) Neither the Committee nor the Senate has passed upon the objections to the subpoena.

Where a Senate Committee seeks the aid of a court to enforce a subpoena, a range of questions are presented which go far beyond matters of "congressional administration." *Gojack* v. *United States,* 384 U. S. 702, 707 (1966). Once the court powers are sought to be invoked, judicial standards must govern the attempted invocation of judicial power. Moreover, judicial power is not available to a Senator of the United States as such unless he acts with authority and direction of the United States Senate. And the Congress by the procedure established under 2 U.S.C. §194 has made it clear that invocation of a judicial remedy requires action of the House or Senate itself as the case may be, and it is a deliberative action which is required. *Wilson* v. *United States,* 369 F. 2d 198 (C. A. D. C., 1966). It is with these principles in mind that we note other deficiencies in the subpoena.

1. There is no resolution authorizing the specific inquiry.

Attached as Appendix Q-3 hereto (127a) is a copy of the Rules of Procedure of the Permanent Subcommittee on Investigations of the Committee on Government Operations of the Senate. The first sentence of Rule 1 reads as follows:

> No major investigation shall be initiated without approval of either a majority of the Subcommittee or a majority of the full Committee on Government Operations.

This is almost exactly the language of Rule 1 of the House UnAmerican Activities Committee, which was re-

ferred to by this Court in *Gojack* v. *United States, supra,* in which this Court set aside a conviction because there had been no proof that the inquiry had been authorized.

There is not an iota of proof in this case that the inquiry into the activities of some 13 organizations has been authorized or for that matter, any part of the supposed investigation. There is attached to Senator McClellan's affidavit a poll of the Subcommittee on July 31, whereby the Senate was requested to adopt what became Senate Resolution No. 150 (107a). But after its adoption on August 11, 1967 there is no indication that the Senate Subcommittee mapped out or authorized any specific investigation thereunder. And while Senator McClellan attaches a statement that he made on November 1, 1967 (102a), that is hardly action by a majority of the Committee, and in any event even that statement was made after these subpoenas were served.

In his argument against the application for emergency relief, the Solicitor General contended that there was no necessity for a resolution of the Senate Subcommittee because Senate Resolution No. 150 directed an investigation into the causes of urban rioting. But the House Committee resolution involved in the *Gojack* case authorized an investigation into un-American activities and this Court rejected precisely this kind of argument made by the Solicitor General in that case. 384 U. S. at 706. The point, of course, is that there is quite a step from a general direction of the Senate to conduct an investigation into the causes of urban rioting and the specific inquiry here undertaken in respect to the organizational affairs of some thirteen First Amendment type organizations.

2. The Committee did not authorize issuance of the subpoena.

Rule 2 of the Committee Rules merely grants the power to the Chairman to perform the ministerial act of issuing

the subpoenas; it does not transfer to the Chairman the power to determine what subpoenas shall be issued. *Shelton* v. *United States*, 327 F. 2d 601 (C. A. D. C., 1963). And the language of the Senate resolution granting the "discretion to the Chairman to require production of books, papers and documents" (126a) did not override the power of the Committee to make policy decisions. If it did, we would be faced with an unlimited delegation of power without any standards whatever. This could not possibly be sustained as the basis for the invocation of judicial power.

3. *Neither the Senate nor any Committee thereof has passed upon the objections to the subpoenas.*

Had the subpoenas been tested by the contempt process there would have to be a showing that the witnesses' objection to a question or a direction to produce documents had been considered and disposed of by the Committee. *Slagle* v. *Ohio*, 366 U. S. 259 (1961). But this is not a mere formal matter because only by that procedure is the action of the Subcommittee in authorizing the subpoenas and of the Chairman in issuing the subpoenas subject to deliberative review by the majority of the Subcommittee and of the Committee itself. Ultimately it is the Senate, under the certification procedure provided for under 2 U.S.C. §194, which reviews an order to a witness. Not every witness who does not respond to a subpoena is cited for contempt. Sometimes a subcommittee either does not think enough of the issue, or does not want to test the subpoena it has issued by its chairman; perhaps it may even change its mind. And the Senate does not necessarily have to agree with the subcommittee. The deliberative nature of certification procedures was recently emphasized by the Court of Appeals for the District of Columbia in the case of *Wilson* v. *United States*, 369 F. 2d 198 (1966).

There is not a word in this record which indicates that the majority of the Subcommittee has passed upon—let alone even knows of the existence of—the subpoenas here served. Certainly the Senate has not passed upon them. The only fact in the record is that Mr. Brick, an investigator of the McClellan Committee, at the personal direction of Senator McClellan, prepared the subpoenas and that after some discussion with the Senator the subpoenas were signed and returned to Mr. Brick for further action (112a).

Thus the record in this case fails to show a series of elementary requirements for testing the issuance of committee subpoenas. And by reason of the very fact that the subpoenas are served upon a third party, the deliberative process of the committee and the Senate is sought to be short-circuited—a process which, after all, is the means by which the legislative body exercises preliminary control over its own agents.

II

The three-judge court was properly convened; its jurisdiction upon being convened extended to all matters relating to the seized documents; and this Court has jurisdiction over this appeal.

The three-judge court was properly convened since an injunction was sought against the enforcement of a state statute. 28 U.S.C. §2281 speaks precisely to that situation.

And the three-judge court having been properly convened, it has the jurisdiction and power to determine all questions in the case; *Railroad Commissioners of California* v. *Pacific Gas & Electric Co.*, 302 U. S. 388 (1938); *Sterling* v. *Constantin*, 287 U. S. 378 (1932); *Florida Lime and Avocado Growers* v. *Jacobson*, 362 U. S. 73 (1960); even those not specifically related to the matter of enjoining the

state statute; *Bibb County Board of Education* v. *United States*, 88 S. Ct. 415 (1967); *cf. Zemel* v. *Rusk*, 381 U. S. 1 (1965).

The original complaint in the instant case sought injunctive relief against prosecution under the Kentucky statute and as an integral part of that relief the return of the documents which had been seized under that statute (see prayer for relief in original complaint 39a). The three-judge court in this case has not fully adjudicated the demand for relief; it enjoined the prosecution but on the matter of the documents it temporarily deined injunctive relief and placed them in *custodia legis* pending a final order of the court. The December 13 order finally denied a motion for a restraining order to enjoin the turning over of the papers to the Senate Subcommittee. This, of course, was the final determination of the injunctive relief originally demanded, i.e., the return of the papers. And since the papers were in *custodia legis* of the three-judge court, no other court could in fact interfere with the jurisdiction of the three-judge court to dispose of them. *Cf., United States* v. *Bank of New York*, 296 U. S. 463 (1935).

The three-judge court having been properly convened and its order of December 13 having denied injunctive relief, the within appeal falls squarely within the language of 28 U.S.C. §1253:

a) The order of December 13 denied an injunction;

b) The denial was in a civil suit required by the act of Congress to be heard by a District Court of three judges.

There is nothing in 28 U.S.C. Sec. 1253 which requires that this court's appellate consideration of the injunction which is granted or denied shall necessarily entail consider-

ation of constitutional questions (*Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535 (1954); *Lee* v. *Bickel*, 292 U. S. 415 (1934) or even that the injunction which is granted or denied involve the enforcement of the State Statute as distinguished from action which standing by itself would never have justified convening of a three judge court. *Bibb County Board of Education* v. *United States, supra.* It is rather that the injunction which was denied shall have been in a civil suit, which was required to be heard by a three-judge court; and that is clearly the case here. The Court has consistently read Sec. 1253 to mean that any of the issues properly before the three-judge court are within the appellate jurisdiction of this Court. "The three-judge court was properly convened . . . and we therefore have jurisdiction over the appeal." *Zemel* v. *Rusk*, 381 U. S. 1, 7 (1965); *cf. Moody* v. *Flowers*, 18 L. Ed. 2d 643 (1967). Certainly that is the case here.

III

If the court does not have jurisdiction under 28 U.S.C. § 1253, it has jurisdiction by way of *certiorari.*

Although we believe there is no basis whatever for any doubt as to this Court's jurisdiction under 28 U.S.C. Sec. 1253, we are mindful of the last sentence of this Court's order of January 29, 1968. Accordingly, in order to avoid any possible delay in this Court's dealing with the major constitutional issues which are involved, we have taken appropriate steps as outlined by this Court in *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368 (1949) and *Turner* v. *City of Memphis*, 369 U. S. 350 (1962). The time for appeal to the Court of Appeals not having expired, appellants have prior to the submission of this Jurisdictional Statement, filed a protective appeal to the Sixth Circuit (132a).

and we suggest to the Court that if there is any question as to its jurisdiction under 28 U.S.C. §1253, it consider this a petition for writ of *certiorari* to the Court of Appeals for the Sixth Circuit to review the matter directly before judgment. The reasons why the Court should exercise its discretion in this regard are clear:

1. The questions are substantial and important, and even the Solicitor General in his earlier submissions has emphasized the need for their speedy resolution.

2. The Court, not merely the Circuit Justice, has already had the matter before it on two applications for emergency relief.

3. Economy of judicial effort would indicate that this Court hear the matter directly.

CONCLUSION

For the reasons aforesaid we submit that the Court should either note probable jurisdiction upon the appeal filed herein or grant a writ of certiorari before judgment to the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

DAN JACK COMBS,
ARTHUR KINOY,
WILLIAM B. KUNSTLER,
MORTON STAVIS,
By: MORTON STAVIS

Attorneys for Appellants.

APPENDIX A

Final Order of the United States District Court for the Eastern District of Kentucky at Pikeville

(Filed—December 14, 1967.)

On September 14, 1967, this Court entered a final judgment in this matter, declaring and providing, among other things, that the books, papers, documents and other materials in the possession of the defendant Ratliff, Commonwealth's Attorney, Pike County, Kentucky, as reflected by the inventory filed with this action, would continue to be held by him in safe keeping until the final disposition of this case by appeal or otherwise.

Subsequently, on October 18, 1967, plaintiffs filed a motion with this Court seeking the issuance of a temporary restraining order enjoining the release of said books, papers, documents and other materials, pursuant to a subpoena duces tecum of the Senate Permanent Sub-Committee of Investigations of the Committee on Government Operations, and also a motion for an order directing the return to plaintiffs of said books, papers, documents and other materials, maintaining that the defendants' time for appeal to the United States Supreme Court had expired. These two motions were denied by this Court on October 30, 1967.

On November 1, 1967, plaintiffs filed a notice of appeal to the Supreme Court of the United States as to so much of this Court's order of October 30, 1967 as denied the motion for the restraining order. Upon request, on November 2, 1967, this Three-Judge Court granted a twenty-four

hour stay from the effect of its order of October 30, 1967, to allow time in which plaintiffs might seek emergency relief in the Supreme Court of the United States.

On November 10, 1967, Mr. Justice Stewart, for the Supreme Court, granted emergency relief to the extent that the documents in issue remain in their then custody until this Three-Judge Court might hear and rule upon the factual and legal objections of the plaintiffs to the validity of the subpoena duces tecum of the Senate Committee.

Whereupon, on December 5, 1967, this matter came on for hearing on said objections before this Three-Judge Court. The entire record of all past proceedings in this action were made a part of the record for the purposes of the final disposition of this matter. The interested parties plaintiff and defendant jointly tendering to this Court by stipulation or exhibit all evidentiary facts desired by them to be introduced upon the question, and briefs having been filed and arguments having been heard, and this Court being duly and sufficiently advised, IT IS HEREBY ORDERED that the objections of the plaintiffs to the subpoena duces tecum of the Senate Committee be and the same are hereby overruled, AND IT IS FURTHER ORDERED that the defendant Ratliff, Commonwealth's Attorney, Pike County, Kentucky, be and he is hereby ordered and directed, subject to the hereinafter stay provisions of this order, to comply with the subpoena duces tecum of the Senate Committee by allowing said Committee representatives to photograph copies of any of the desired books, papers, documents and other materials now in his possession under order of this Court. Such copying is to be under the supervision of the United States Marshall of this Court, this Court having been advised that the copying of the documents only is the desire of the Senate Committee. IT IS FURTHER ORDERED that the

plaintiffs be and they are hereby granted a stay of five (5) days from the date of this order before compliance by the defendant Ratliff, Commonwealth's Attorney, Pike County, Kentucky, to the subpoena duces tecum, to apply to the Supreme Court of the United States for a review of this order.

December 13, 1967

BERT T. COMBS
Judge, U. S. Circuit Court of
Appeals for the Sixth Circuit

BERNARD T. MOYNAHAN, JR.
Judge, U. S. District Court for
the Eastern District of Kentucky

JAMES F. GORDON
Judge, U. S. District Court for
the Western District of Kentucky

APPENDIX B

Order of the United States District Court for the Eastern District of Kentucky at Pikeville

(Filed—October 30, 1967)

Three Judge Panel:

BERT T. COMBS, Circuit Judge
BERNARD T. MOYNAHAN, JR., District Judge
JAMES F. GORDON, District Judge

The motion of the plaintiffs, Alan McSurely, Margaret McSurely and Joseph Mulloy, that the materials now in the custody of the Commonwealth Attorney of Pike County be returned to them at this time is overruled.

The motion of plaintiffs for a restraining order enjoining defendants from releasing such of the materials as are desired by the Committee of the United States Senate is overruled.

The parties to this action and the officers of this court are directed to cooperate with the Senate Committee in making available such of the materials, or copies thereof, as the Committee considers pertinent to its inquiry; but until time for appeal has expired, this will be done in such manner as to keep intact those materials that may be pertinent to the appeal of this case.

The Honorable Bert T. Combs, Circuit Judge, and the Honorable James F. Gordon, District Judge, concur in this order.

BERNARD T. MOYNAHAN, JR.
Judge, Eastern District of Kentucky

APPENDIX C

Order of the Supreme Court of the United States dated November 10, 1967

The application for emergency relief presented to Mr. Justice Stewart, and by him referred to the court is granted to the extent that the seized documents shall remain in their present custody pending further proceedings in the U. S. District Court for the Eastern District of Kentucky.

This order is conditioned upon the applicants' presentation, within five days, to such District Court of any objections they may have to the validity of the subpoena duces tecum issued by the Permanent Subcommittee on Investigations of the Committee on Government Operations of the U. S. Senate and shall remain in effect pending the ruling of such District Court upon any such objections as may be presented.

APPENDIX D-1

Plaintiffs' Notice of Motion for Temporary Restraining Order

(Filed—October 18, 1967)

Come plaintiffs, Alan McSurely and Margaret McSurely, by counsel, and respectfully move the Court, or any Judge thereof, for the immediate issuance of a temporary restraining order enjoining all defendants, their agents, servants and employees from releasing the books, papers, documents and other materials seized and taken from the home of these plaintiffs by defendants, their agents, servants and employees on the night of August 1, 1967, which material is now under the jurisdiction of this Court and in the custody of the defendant, Thomas B. Ratliff, Commonwealth Attorney of Pike County and which property has been inventoried, and as grounds therefor says that by Order entered herein on the 14th day of September, 1967, said books, papers, documents and other material reflected by the inventory filed in this action continued to be held by the said Thomas B. Ratliff, in safekeeping until final disposition of this case by appeal or otherwise; that defendants' time to appeal to the United States Supreme Court has now expired and the duly elected Commonwealth Attorney Thomas B. Ratliff being absent, they through their attorney made demand upon Assistant Commonwealth Attorney, Herman G. Dotson, for the return of said property which request was denied; that between 8:00 and 8:30 A.M. on Wednesday, October 18th a subpoena was served upon these plaintiffs by an individual identifying himself as John Brick, an employee of the Senate Permanent Subcommittee on Investigations of the Committee on Government Operations, which committee J. M. McClellan is Chairman. Plaintiffs file herewith and make a part hereof photocopy of said subpoena with attached two-page schedule, marked Exhibits A and B for purposes of identity.

Exhibit D-1

Plaintiffs further say that they have been reliably informed that copies of the subpoena had previously been served upon Thomas B. Ratliff and upon Archie Craft, United States Marshal for the Eastern District of Kentucky; that unless these defendants, their agents, servants and employees are so enjoined they will release plaintiffs' books, papers, documents and other materials unto the agents and employees of the aforesaid Committee thereby depriving this Court of jurisdiction of said books, papers, documents and other materials, and depriving these plaintiffs of their properties and their constitutional rights thereto.

Plaintiffs further say that unless defendants are so enjoined they will suffer irreparable damage for which they have no adequate remedy at law.

WHEREFORE, plaintiffs respectfully pray for the immediate issuance of a protective order of this Court, or from a single Judge thereof, and for all other relief to which they may appear entitled.

WILLIAM M. KUNSTLER
511 Fifth Avenue
New York, New York

DAN JACK COMBS
Pikeville, Kentucky
DAN JACK COMBS
Of Counsel for Plaintiffs

Exhibit D-1

To: Honorable Thomas B. Ratliff
Honorable Perry A. Justice
Honorable Grover Adkins
Honorable Robert L. Matthews

You and each of you are hereby notified that the foregoing motion for temporary restraining order will be filed in the United States District Court Clerk's office at Lexington, Kentucky before 5:00 P.M. on Wednesday, October 18th and that same will be brought for hearing as soon thereafter as counsel can be heard.

This 18th day of October, 1967.

/s/ Dan Jack Combs
Of Counsel for Plaintiffs

APPENDIX D-2

Plaintiffs' Motion for Issuance of an Order Directing the Return of all Material, etc.

(Filed—October 18, 1967)

Comes plaintiffs, Alan McSurely, Margaret McSurely and Joseph Mulloy, and respectfully move the Court for the issuance of an order directing the return to them of all books, papers, documents and other materials under the jurisdiction of this Court and under the custody of Thomas B. Ratliff, Commonwealth Attorney of Pike County, and as grounds therefor says that by order entered herein on the 14th day of September, 1967, said books, papers, documents and other materials as reflected by the inventory filed herein were to remain in the custody of the said Thomas B. Ratliff for safekeeping until final disposition of this case by appeal or otherwise. Plaintiffs further say that defendants' time for appeal to the United States Supreme Court has now expired and that they, by and through their attorney, have made request upon Honorable Herman G. Dotson, Assistant Commonwealth Attorney for Pike County, the duly elected Commonwealth Attorney Thomas B. Ratliff being absent therefrom, for a return of their properties; that said request was denied.

Plaintiffs further move the Court for judgment against the defendants for their costs herein expended and further move the Court for judgment against the defendants for a reasonable attorneys fee.

WHEREFORE, plaintiffs pray the appropriate orders of the Court.

WILLIAM M. KUNSTLER
511 Fifth Avenue
New York, New York

DAN JACK COMBS
Pikeville, Kentucky
DAN JACK COMBS
Of Counsel for Plaintiffs

APPENDIX E

Inventory of the Material, Literature and all Objects Seized from the Plaintiffs in the above Styled Case

Books

290 volumes of False Witness by Harvey Matuson

1 volume of Red Star Over China—Edgar Snow

1 A Star to Steer By—Hugh Mulgae

1 Future American History—Philip S. Foner

2 The Role of Individuals in History)
The Materialist Conception of History)—George Plekhanor

1 Tricks and Training for Cats—Morris L. Groder

1 The Tasks of the Proletariat in Our Revolution—V. I. Lenin

1 Confession of Faith—W. W. Woodward

1 The Fourth Branch of Government—Douglass Cater

1 The Rebel—Albert Camus

1 What is to Be Done—N. D. Chernyshevsky

1 The Diary of a Redman—Nokolai Gogal

1 Illusion and Realty—Christopher Gaudwell

1 Good News for Modern Man—American Bible Society

1 American Negro Slave Revelts—

1 Weapon—Herbert Aptheker

1 How United States Got Involved in Vietnam—Robert Schee

Appendix E

1 The United States in Vietnam—American Friends Service Committee

1 The Death Agony of Capitalism and the Tasks of the Fourth International (Pioneer Publishers)

Ramparts

Statements of a Religious Bodies in the Conscientious Objector

National Service Board for Religious Objectors

The Teachings of Karl Marx—Lenin

Catholics and Conscientious Objectors—H. Forest

2 volumes—Guide to Conscientious Objection

Marx as an Economist—Maurice Dobb

Communist Manifesto—Karl Marx

Soviet Documents — Frederick Engels — Crosscurrents Press

The Part Played by Labor in the Transition from Ape to Man—Frederick Engels

The Other Side—Staughton Lynn—Thomas Harper

Education of John Reed and Revolution in Spain—John Stuart

The Hoax—Marx and Engels

Lois Lawrence

TVA Democracy on the March—David F. Lillenthal

Mission to Hanoi—Herbert Aptheker

World Trade Union Movement—William Z. Foster

Appendix E

The Negro People in American History—William T. Foster

Old Father Antic—Lois Lawrence

Battle for the Mind—William Sargent

Man, Nature and God—FSC Northrop

Man's Search for Meaning—Vikton E. Frankl

Third Party Movements in United States—Will B. Hesseltine

Easter Week—Brian O'Neill

Quotations from Chairman Mao Tse-Tung

Capital Volume I and II—Karl Marx—Progress Publishers, Moscow

Capital Unabridged—Karl Marx

Volumes I, II and III

Is Communism the Next State—Jacob Budish

The Way of Zen—Adam Watts

Containment and Change—Carl Oglesby & Richard Shaull

Tactics of Extremism—Harry & Bonaro Overstreet

Progress or Poverty—Leon H. Keyserling

Grinnell College Bulletin

Vietnam—The Inside Story of The Guerilla War—Winfred G. Burchett

The Wretched of the Earth—Franz Fanon

The Makings of a Just Society—Chester Bowles

Appendix E

Freedomways

Letters to Americans—Marx and Engels

Malthus—Marx and Engels

Reader in Marxist Philosophy (From M. E. and Howard Solsam & Harry Martel—Lenin

Economic Growth and Underdeveloped Countries— Maurice Dobb

16 volumes—Labor Fact Book—Labor Research Association

17 volumes—Labor Fact Book—Labor Research Association

International Regional Organizations—Ruth C. Lawson

Political Economy—John Eaton

Role of Individual in History—George Plekhanor

Materialist Conception of History—George Plekhanor

Problems of Contemporary History—R. Palmer Putt

Architecture and Form—Peter Blake

Militarism and Industry—Victor Perlo

Mill Town—Bill Cahn

Case of Joe Hill—Philip S. Foner

Mao Tse-Tung—Selected Works

Mission to Hanoi—(Combine)

Pre -Capitalist Economic Formations—Marx

18th Brunaire of Louis Bonaparte—Marx

Handbook for Conscientious Objectors

Appendix E

Selected Poems—Bertolt Brecht

Socialism—Utopian and Scientific—Engels

Foundations of Leninism—Stalin

Vietnam North—Wilfred C. Burchett

The Human Ideology—Marx and Engels

Ludwig Feuderbach—Engels

Three Who Made a Revolution—Bertram P. Wolfe

History of American Trolskism—James P. Cannon

Mao Tse-Tung—Volume II

History of Cuba I—Philip S. Foner

History of Cuba II—Philip S. Foner

Materialist Conception of History—S. Plek

Mill Town—Bill Cahn

Wednesday's Children—Leontine Young

Income Revolution—Victor Perlo

The Forest—William J. Pomeroy

Alderson Story—Elizabeth Gurley Flynn

True Believer—Eric Hoffer

Introduction to Marxism—Enele Burns

(Illegible)—The Spark Highway and the City—Lewis Mumford

The Same Poor—John Updike

Sidahanths—Herman Hesse

Asylums—Broina Goffman

Appendix E

Ancient Pagan Symbols—Elizabeth Goldsmith

Ideas They Cannot Sail—Eugene Dennis

How to Make Money in one Day at the Track—Charles S. Raomanelli

Hans and Rebels—Jessica Mitford

Peaceful Coexistence—John and Margrit Pittman

Psychotherapy East and West—Alan W. Watts

Theory of Knowledge—Maurice Cornforth

Poverty and Roots and Future—Hyman Lumer

The Open Society—Stanley Ryeson

Bureaucracy in Modern Society—Peter Blau

The Small Group—Michaels Olmsted

Brothers Karamazov—Fyodor Dostoyevsky

The Inheritance—Mollard Lampell

John L. Lewis

Soviet Documents—Vol. II—Kruschchev

Labor Fact Book No. 17—Labor Research Association

The Press—A. J. Liebling

Middletown—Orbert Lynd and Helen Lynd

Collected Poems of W. B. Yeats

Inside Story of Guerilla War—Wilfred G. Burchett

Yesterday's People—Jack E. Weller

Empire of High Finance—Victor Perlo

Compesea Nation—Sidney Finleston

Appendix E

The Magic Form—Phillip Bonosky

The Education of John Reed—John Stuart

Guerilla Warfare—Che Gurvara

The Potomac

A Star to Steer By—Hugh Mutae

Holmes Institute—Principals of Leadership

Stravinsky on the Theatre

Communist Mahifesto—Marx and Engels

The Stormtrooper

New Politics News—Convention Center

Union for All Railroad Workers

Freedom School Poetry

Liberation—Independent Monthly—July-67—March-67

3 copies—Ramparts—Feb., Oct., Nov. 1966—Dec. 66

2 copies—Office, Chief of Ordinance and Principles of Leadership

Cap Grantees—Office of Economic Opportunity

Crime and Delinquency (Apr. 64—Oct. 1964)

Leader in Marxist Philosophy

The Paris Commune—V. I. Lenin

Studies on the Left

Value, Price and Profit—Marx

To the Rural Poor—V. I. Lenin

2 copies—Proletarian Revolution and Renegade—Kautsky—Lenin

Appendix E

In Friend's Vanguard—NAACP

Private Organization Providing Assistance In Indoor Recreation—Dept. of Interior

Freedom School Poetry

Mountain Education Program

Mission to Hanoi

The FBI Secret Service Coverup—Harold Weisberg

Dialectional and Historical Materialism—Stalin

Communist Manifesto—Marx

ETC—Charles L. Todd—Volumes I and II

To the Rural Poor—V. I. Lenin

Trends on American Capitalism—Labor Research Association

War Elections—Lee Morton

101 Famous Poems—Roy J. Cook

2 copies—House Unamerican Activities Committee

2 copies—A Southerner Looks at Negro Discrimination—Geo. W. Cable

State and Revolution

Boys and Girls At Work in USSR—Alexei Antonv

I. W. W. Songs

18th Brumaire of Louis Bonaparte—Marx

ETC—Elisabeth Hartiett

2 copies—Value, Price and Profit—Marx

Appendix E

Negro Slave Revolts in U. S.—Hox

Soviet Documents

Head Start—Child Development Programs

The American Civil War—Herbert Aptheker

Coal Mines and Coal Miners

25 years of Industrial Unionism

The Big Wage Gyp—I. U. M. N. S. W.

The Union on the Job—I. U. M. N. S. W.

Science versus Idealism—Maurice Cornforth

Our Respected Society—Seymore Melonar

The Truth About Vietnam

The Mike Gold Reader

Salt of the Earth—Herbert Biberman

Ivan P. Pao 300

People on Guan Sapes—Wendell Johnson

Papa Wore No Halo—Susan H. Jefferies

Point of the Lance—Sargent Shriver

Giant at the Crossroads—M. Ilin F. Segal

2 copies—Existentialism and Alienation on American Literature—Sidney Findelstein

John Brown—W. E. Burghardt Du Bois

Ring of Truth—J. B. Phillips

The Negro on Southern Agriculture—Victor Perlo

Basic Writings of C. O. Jung

Appendix E

Economic and Philosophic Manuscripts of 1844—Marx

Illusion and Reality—Christopher Caudwell

The Ambassador—Morris L. West

Economic & Philosophic Manuscripts of 1844—Marx

Economic Growth in Underdeveloped Countries

2 copies—Critique of the Gotha Programs—Marx

18th Brumaire of Louis Bonaparte—Marx

Lenin—Marx Engels

Basic Writings of Sigmund Freud

Pennsylvania Avenue—Presidents Temporary Commission on Pennsylvania Ave.

Why I Am Not A Christian—Bertrand Russell

The Press and American—Emery and Smith

The World and Africa—W. E. Burghard Du Bois

Living Time and the Integration of the Life—Maurice Nicoll

Wage, Labor and Capital—Marx

Value, Price and Profit

Beyond the Chains of Illusion—Erich From

Metropolitan Transportation Problem—Wilford Owen

Guerilla Warfare—William S. Pomeroy

Introduction to Marxism—Emile Burns

Fear and Trembling The Sickness Unto Death—Kirkegard

Appendix E

Poverty Its Roots and Its Future—Hyman Lumer

Rice Grains—Amado U. Herman Hes

Gene Debs—Herbert M. Morris and William Cahn

Petrenius—Waters

Mans Wordly Bonds—Leo Huberman

Between Men and Man—Martha Buber

The Right of Nations to Self Determination—V. I. Lenin

The Woman Question—

The Life and Writings of Frederick Douglas

Man's Struggle for Shelter on an Urbaning World—
Charles Abrams

Men & Revolution—John Lewis

Moves that Matter

1965—Peace Calendar and Appointment Book

Poetry & Prose—William Cullen Bryant

Guide—April 1967

Jeane Soles

The Correspondent

1—Notebook Binder and Contents

Draft Age Listen—American Friends Service Comm.
Cambridge, Mass.

1—Film Box—containing 3 metal cannisters containing

Vaya Con Dios Part I, II, III

Guffanti Film Lab. New York, N. Y.

Appendix E

Address on box to Mrs. Margaret McSurely,
Pikeville, Ky.

26—Posters Assorted sized black and white and colored
Smallest 14 x 20
Largest 30 x 24

Box No. 1—Wooden Book containing College Examinations and Review notes, cancelled checks, cancelled checks deposits slips of Alan McSurely until 1965

Box No. 2—Box contains 13 brown manilla envelopes containing items such as paid receipts, blank checks and personal correspondence, information on symphony orchestras and letters on campus politics

Box No. 3—Box contains newspaper clippings local and out of state—personal correspondence—John Birch coloring book

Box No. 4

A. Contains individual insert files containing program reports and progress reports.

1. Pike County
2. Summer Ideas
3. Project Response
4. Miscellaneous File
5. South West File
6. Why Not?
7. No. III—Manifesto For Radical America
8. Congress Heights

Appendix E

9. C.C.A.P.

10. Miscellaneous Items

Box No. 5

A. Contains printed literature and American magazines and newspapers.

1. One insert file—Noon Minutes and J and BR Court No. 616

2. Literature on Metropolitan Development

Box No. 6

A. File folder A to Z on forms and information on training and projects and general information about the office.

Box No. 7

A. Literature on urban American environment and newspaper clippings also literature on a conference to improve quality of urban America.

Box No. 8

A. Box containing assorted literature, guitar courses, poster design and manufacturer, carbon paper, and National Magazines, U.P.O. Planning Memos, and Pictures and Personal Correspondence.

Box No. 9

A. Folder containing 15 lapel buttons of Black Power inscribed SNCC.

Appendix E

Box No. 10

A. Contains files and Index cards on humans or individuals, pictures. A banner on the March on Washington, income tax statement (1964) Mimeographed literature.

Box No. 11

A. Contains cancelled checks and personal banking information of Mr. and Mrs. Alan McSurely of Pikeville, Kentucky and Mrs. Margaret H. Laughum of Washington, D. C., also insurance information of the above.

Box No. 12

A. Contains Questions and Answers on Vista, National Magazines, rough drafts, personal correspondence, newspaper clippings, The Freedom Government and information on the free school.

Box No. 13

A. Contains a Washington yellow page telephone directory, assorted paper back books such as the Bitter War, Negro Military Servicemen, and Racial Discrimination in Housing, National Magazines, personal correspondence, newspapers and other civil rights literature, also Antipoverty program.

Box No. 14

A. Contains assorted handbills, literature on Bureau of Mines, a book entitled The Southern Apalachian Region, and National Magazines, and a Williamson Daily newspaper dated Wednesday, August 16—Caption reads Sedition Case.

Appendix E

Handbills as follows:

1. 37—How to Put out Community News
2. 94—Compare the Candidates is the headline of a political advertisement of a Louisville Times dated May 10, 1967.
3. 54—The Third Reconstruction
4. 27—Seeds of Democracy
5. 1—Booklet on Freedom of Choice and Housing which is a Manual for Negro House Seekers.

Rough notes and Files, a notebook and an outline of information on Juvenile Delinquency Problems in the United States.

Box No. 15

A. One box of national newspapers and magazines and one piece of plate glass, and a U.M.W.A. Journal, also a handbook on legal right of the poor in the Kentucky mountains.

Box No. 16

A. Box contains national magazines, printing equipment as ink, blotter, and two cans of Dri-Fast Ink, a Workbook on Maryland-National Capital Park and Planning Commission, 150 4″ x 8″ envelopes with the return addresses as follows: Southern Conference Educational Fund, 3210 W. Broadway, Louisville, Kentucky 40211, one bookend, ashtrays, civil rights literature and brochure on Metropolitan Washington, an annual report of the Council of Governments.

Appendix E

Box No. 17

A. Index files—One of the Far North East and another of Personal correspondence. A file of three short plays by Alan McSurely entitled:

1. The Bathroom
2. We, I, We
3. I Was Late

B. Personal correspondence of Keystone Securities Incorporated.

C. First Drafts File
1. Rough Draft of personal correspondence.

Box No. 18

A. Handbill Literature

1. 5 Books on Bituminous Coal Facts of 1966
2. 37 Copies of Kentucky Public Assistance Benefits on Medical Assistance Programs
3. 46 copies of Kentucky Public Assistance for Aged, Blind, and Disabled
4. 16 Copies of Kentucky Public Assistance on Civil Rights
   a. All this material published by Commonwealth of Ky.
5. Copies 177 of Coal
6. 100 copies of New Uses for Good Earth in storybook form

Appendix E

7. 62 pamphlets of Poverty Affluence Applachian Wonderland by Harry M. Caudill and William C. Blizzard
8. 29 copies of Coal origin of valuable natural resources
9. 58 copies of page inserts of training manual
10. 36 Handbills of Poor People's Corporation
11. 188 pamphlet of Map of Coal Areas in the United States
12. 1 House Un-American Activities Committee
13. 64 SNCC Acts on Draft a newspaper
14. 17 copies of Find Out the Facts Before its Too Late
15. 4 copies of Coal Aid to Higher Education
16. 7 Assorted copies of newsletter Nation
17. 65 copies of Four Kentucky Miners Face Prison Terms

Box No. 19

A. Handbills and Newsletters

1. 9 copies of the Children of Vietnam
2. 7 copies of the Vietnam Report
3. 60 copies of the Southhern Patriot
4. 4 copies of the Government of the Black, By the Black, For the Black
5. 6 copies of Changes
6. 3 copies of the Deep South Patriot

Appendix E

7. 36 copies of Marian Davis Scholarship Fund.
8. 4 Medical Problems of South Vietnam dated January 1967.
9. 1 copy of American Liberal
10. 2 copies of Considerable Comment on Selective Service.
11. 2 copies of Questions and Answers on Vietnam.
12. 2 copies of We Burned Every Hut.
13. 1. copy of Vietnam: The Case of Extrication.
14. 2 copies of The United States and Vietnam
15. 2 copies of Catholics and Conscientious Objection.
16. 1 copy of American Lifelines—Federal Aid for Highways.
17. 2 Magnetic Recording tapes of a 7 inch reel, one in carton, entitled Forty Cents a Ton, the other title is not known.
18. 100 bundles of Getting People Together.
19. 24 bundles of Introduction.
20. 2 bundles of Maximum Feasible Participation.
21. 125 pages of Page 3 of Getting People Together.
22. 320 pages of Page 2 of Getting People Together.
23. 300 pages of Page 1 of Getting People Together.
24. 540 pages of Introduction.
25. 3 pamphlets on Water, Poverty and Political Power in Appalachia.
26. 129 pages of Maximum, Feasible Participation.
27. 10 on Join the Struggle for a Decent War.

Appendix E

B. All information following on a pamphlet of the political union.

1. 24 sheets of A New Political Union.
2. 37 sheets of Page 3.
3. 24 sheets of Page 7.
4. 18 sheets of Page 8.
5. 4 sheets of Page 9.
6. 24 sheets of Page 10.
7. 32 sheets of Page 11.
8. 24 sheets of Page 4.
9. 34 sheets of Page 13.
10. 27 sheets of Page 16.
11. 47 sheets of Page 17.
12. 32 sheets of Page 14.
13. 32 sheets of Page 13.

C. 39 Copies of Life with Lyndon and the Great Society.

D. One green metal filing cabinet, consisting of two drawers of files.

1. Consists of rough drafts, personal correspondence, typewritten correspondence, and newspaper clippings.

E. One brown file cabinet.

1. Consisting of two drawers. (each drawer approximately half full)

Appendix E

a. Organizational literature, procedure manuals and assorted road maps.

F. File drawer on Mr. Joseph Mulloy of Pikeville, Kentucky.

1. Information on file as follows:

a. A—Appalachian Freedom School

b. AV—Stories

c. AV—Workers

d. AV—Policies

e. AV—Proposal—What is?

f. CAD

g. CAD

h. Community Newspapers

i. Bob Cole's evaluation

j. Appalachian Stories

k. Information on South

l. Marrabone News

m. Island Creek News

n. By-laws

o. Join Newsletter

p. Join Chicago Newsletter

q. Left over notes

r. Highlander

s. Pike County

Appendix E

t. Pike County

u. AV Board

v. Poverty—Rights Actions

w. SNCC

x. Organizing in a White Community

y. U.M.W.A. Unions

z. Coal

AA. Taxes and Insurance Information

BB. Strip Mining

CC. O.E.O.—Vista Publicity

DD. Wise County

EE. S.D.S.

FF. Developing Organization in the Ghettos

GG. Automobiles

HH. General Correspondence to Joe Mulloy

II. Al McSurely

JJ. Last file had no caption and was bound by a large rubber band.

2. Back of drawer contained the following books.

1. Mao Tse-Tung—Anne Fremantle

2. Catch-22—Joseph Heller

3. Socialist Thought—Albert Fried and Ronald Sanders

Appendix E

4. Essential Works of Lenin—Henry W. Christian
5. The Berkely Student Revolt — Seymour Martin Lipset and Sheldon S. Wolin
6. Great Russian Short Stories — Morris Houghton
7. Corridors of Power—C. P. Snow

Box No. 20

A. Contains Handbill Literature either damaged or soiled by folding or by walking, notebook binder and typewritten information termed The Organizer's Workbook.

B. One small blue binder containing typewritten and handwritten adresses and phone numbers of individuals.

1. This binder is half full.

Box No. 21

A. A small brown box of inventoried exhibits displayed at Lexington, Ky. as marked.

Box No. 22

A. Contains 29 individual folders of personal information programmed and counted by the Commonwealth of Kentucky Attorney Mr. Thomas B. Ratliff and his assistants includes small notebook of personal memos of Mrs. Margaret Laughum McSurely of Atlanta, Georgia.

Appendix E

All the above articles and literature will remain in the custody of Thomas B. Ratliff, Commonwealth Attorney, Pikeville, Ky.

Items to be returned by Thomas B. Ratliff Commonwealth of Kentucky Attorney to the plaintiffs in the above styled case by way of the office of Mr. Dan Jack Combs attorney for the plaintiffs of Pikeville, Kentucky.

1—Large bread box containing personal items such as pictures, pencils, bookends, unused paper, unused memo books, assorted literature and manuals distributed by Commonwealth of Kentucky

Also items of personal nature to Mrs. McSurely—unused checks and bank books, road maps and secretarial aids.

1—Wardrobe bag—scotchplaid full of clothing and personal belongings

This inventory was conducted by Thomas B. Ratliff, Thaddeus Scott, Deputy United States Marshals, Joe R. Mullins and Ernest S. Mike under the supervision of Mr. Archie Craft United States Marshal for the Eastern District of Kentucky on September 12, 1967 in the Pike County Courthouse at Pikeville, Kentucky.

/s/ Archie Craft
Archie Craft
Eastern District of Kentucky

APPENDIX F-1

Complaint in the United States District Court for the Eastern District of Kentucky at Pikeville

(Filed—August 16, 1967.)

COMPLAINT

The plaintiffs, for their verified complaint, allege as follows:

I

PARTIES

A. Plaintiffs

1. Plaintiffs Alan McSurely and Margaret McSurely, citizens of the United States and the Commonwealth of Kentucky, are field organizers and writers employed by plaintiffs Southern Conference Educational Fund, Inc. In addition, plaintiff, Alan McSurely is a field organizer for plaintiff The National Conference for New Politics, and a distributor of literature for plaintiff Vietnam Summer. At all times hereinafter set. forth, said plaintiffs were engaged in organizing the povery stricken residents, both black and white, of Pike County, Kentucky, in particular, and the Appalachian Mountain region in general, for united social, economic and political action and for the improvement of their conditions.

2. Plaintiff Southern Conference Educational Fund, Inc. is a corporation organized under the laws of the State of Tennessee, domesticated and maintaining an office for business purposes in the Commonwealth of Kentucky, whose purpose is to help to secure to black and white American citizens the rights guaranteed to them under the Constitution of the United States and to end all forms of racial and

economic segregation, discrimination and injustice in the interests of both black and white citizens of the Southern states.

3. Plaintiff The National Conference for New Politics is an unincorporated association, maintaining an office for business purposes in the State of New York, whose purpose it is to further and advance the growth of a new politics throughout the United States, a politics of ordinary people who want to control democratically the decisions that affect their own lives.

4. Plaintiff Vietnam Summer is an unincorporated association, maintaining an office for business purposes in The Commonwealth of Massachusets. It is designed to reach out to millions of Americans deeply troubled by the War in Vietnam, to find concerned men and women in the communities and neighborhoods across the nation, and to weld them into an organization and active constituency.

B. Defendants.

5. Defendant Thomas Ratliff, a citizen of the Commonwealth of Kentucky, is the duly elected and acting Commonwealth's Attorney for the 35th Judicial District, Pike County, Kentucky. In addition, he is the duly nominated Republican candidate for Lieutenant Governor in the forthcoming general election of November 1967. He is sued individually and in his official capacity.

6. Defendant Perry A. Justice, a citizen of the Commonwealth of Kentucky, is the duly elected and acting Sheriff of Pike County, Kentucky. He is sued individually and in his official capacity.

Exhibit F-1

7. Defendant Grover Atkins, a citizen of the Commonwealth of Kentucky, is the duly elected and acting Jailer of Pike County, Kentucky. He is sued individually and in his official capacity.

8. Defendant Robert L. Matthews, a citizen of the Commonwealth of Kentucky, is the duly elected and acting Attorney General for the Commonwealth of Kentucky, and, as such, the chief law enforcement officer thereof. He is joined in this action as a nominal and necessary party defendant and did not participate in any of the events hereinafter set forth. He is sued only in his official capacity.

II

Jurisdiction of the Court

9. The jurisdiction of the Court over the complaint arises under Title 28 U.S.C. 1331(a), 1343(3)(4), 2201, 2202 2281 and 2284; Title 42, U.S.C. 1971, 1981, 1983 and 1985 and under the Constitution of the United States, and in particular the First, Fourth, Fifth and Fourteenth Amendments thereto..

10. The amounti n controversy, exclusive of interest and costs, exceeds the sum or value of $10,000.00.

III

The Cause of Action

11. The defendants herein, or some of them, under color of certain statutes of the Commonwealth of Kentucky, have entered into a plan or conspiracy with other persons to the plaintiffs unknown to subject or cause to be subjected the plaintiffs, citizens of the United States, to the deprivation

of rights, privileges and immunities secured to them by the Constitution and laws of the United States.

12. Pursuant to this plan or conspiracy, the defendants, or some of them, have attempted to and threaten to continue to attempt to prosecute the individual plaintiffs under the color and authority of certain commonwealth statutes, namely, Kentucky Revised Statute 432.040, which, with related statutes Kentucky Revised Statutes 432.020 and 432.030, is set forth in Appendix A hereto, and incorporated herein.

13. Defendants Ratliff and Justice, without any basis whatsoever in law or fact, attempted to institute the prosecution of the individual plaintiffs by obtaining, on or about August 11, 1967, certain warrants of arrest charging them with the offense of

> teaching, publishing, knowingly circulating displaying or possessing for the purpose of publication or circulation of written matter, movie film, pictures or other material advocating, suggesting or teaching the expediency of physical violence to bring about a political revolution to change or modify the government, constitution and laws of the United States of America and of the Commonwealth of Kentucky in violation of KRS 432.040.

as well as search warrants based upon the sworn affidavit of one James M. Compton stating that

> On August 4, 1967 he was informed by James Madison Compton, a reputable citizen of Pike County, Kentucky, that on said August 4, 1967, at approximately 12:00 noon, that the said James Madison

Exhibit F-1

Compton did observe certain seditious materials, being pamphlets, films, pictures and articles or equipment used in the teaching of sedition and printing and circulating seditious matter at or on the above described premises, which are located in Pike County, Kentucky.

These arrest and search warrants were served and acted upon by law enforcement officers of Pike County, Kentucky, under the control of the defendants herein, or some of them, who illegally and unlawfully seized property belonging to the individual and organizational plaintiffs.

14. Kentucky Revised Statute 432.040 is void and illegal on its face and as applied to the plaintiffs herein in that it violates the Constitution of the United States, and in particular the First, Fourth, Fifth, Eighth and Fourteenth Amendments thereto. This state statute violates the fundamental guarantees of free speech, press, assembly and the right to petition the government for redress of grievances. It violates the guarantee of due process of law in that it is vague and indefinite and fails to meet the requirement of certainty in criminal statutes. It violates the prohibitions against ex post facto legislation and bills of attainder and represents an unconstitutional delegation of legislative power, all in violation of the Constitution of the United States.

15. The aforesaid state statute is likewise void and illegal and of no force or effect in that it invades areas preempted to the exclusive jurisdiction of the United States by statutes and laws enacted by the Congress of the United States by statutes and laws enacted by the Congress of the United States, and has been so held by the Court of Appeals of the

Exhibit F-1

Commonwealth of Kentucky in *Braden* v. *Commonwealth, Ky.*, 291 S. W. 2d 843.

16. Pursuant to the aforesaid conspiracy and plan, the defendants, or some of them, have threatened and continue to threaten to enforce the said unconstitutional, void and illegal state statute against the plaintiffs herein for the sole purpose of subjecting and causing to be subjected the plaintiffs, and the members, friends and supporters of the plaintiff organizations, to the deprivation of rights, privileges and immunities secured to them by the Constitution and laws of the United States.

17. The plaintiffs and the members, friends and supporters of the plaintiff organizations have been attempting through peaceful and non-violent means to achieve the elimination of all forms of racial and economic segregation in the states of the South and the Commonwealth of Kentucky and to assist and encourage black and white citizens thereof to exercise their right to register and vote in federal and state elections and to organize on social, economic and political levels for the attainment of a richer and fuller life for themselves and for all Americans, regardless of race, color, creed or economic status. These objectives are specifically protected and guaranteed by the Constitution of the United States and the Thirteenth, Fourteenth and Fifteenth Amendments thereto. In their constant efforts to achieve these constitutionally protected rights, the plaintiffs and the members, friends and supporters of the plaintiff organizations have been attempting to exercise rights guaranteed under the First and Fourteenth Amendments to freedom of speech, press, assembly and association and the right to assemble, associate and petition for a redress of grievances.

Exhibit F-1

18. Unless the Court restrain the operation and enforcement of this void, invalid and unconstitutional state statute, the plaintiffs and the members, friends and supporters of the plaintiff organizations will suffer immediate and irreparable injury.

The sole purpose, intention and effect of threatening to enforce said statute is to deter, intimidate, hinder and prevent the plaintiffs and the members, friends and supports of the plaintiff organizations from exercising their fundamental constitutional rights guaranteed under the First and Fourteenth Amendments in their efforts to enforce the equality under the law guaranteed by the Thirteenth, Fourteenth and Fifteenth Amendments.

Accordingly, unless this Court restrains the operation and enforcement of this void, invalid and unconstitutional state statute, the plaintiffs and the members, friends and supporters of the plaintiff organizations will continue to suffer the most serious, immediate and irreparable injury in that they will continue to be deterred, intimidated, hindered and prevented from exercising elementary and fundamental federal constitutional rights.

19. Plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs pray for the following relief:

1. That pursuant to Title 28 U.S.C. 2281 and 2284 a three-judge federal district court by immediately convened to hear and determine this proceeding;

2. That a permanent injunction issue

a) restraining the appropriate defendants, their agents, servants, employees and attorneys and all others acting in concert with them from the en-

Exhibit F-1

forcement, operation or execution of Kentucky Revised Statute s. 432.040 and

b) restraining the appropriate defendants, their agents, servants, employees and attorneys and all others acting in concert with them from impeding, intimidating, hindering and preventing the plaintiffs or members, friends and supporters of plaintiff organizations from exercising the rights, privileges and immunities guaranteed to them by the Constitution and laws of the United States, and

c) ordering and directing the appropriate defendants, their agents, servants, employees and attorneys and all others acting in concert with them to account to plaintiffs for the property seized from them or some of them from the home of the individual plaintiffs on the night of August 11-12, 1967, and to return said property forthwith to the appropriate plaintiffs.

3. That a Declaratory Judgment issue declaring that Kentucky Revised Statute s. 432.040 is void on its face and null and void as violative of the Constitution of the United States.

4. That pending the hearing and determination of the prayers for permanent relief, an interlocutory injunction issue

a) restraining the appropriate defendants, their agents, servants, employees and attorneys and all others acting in concert with them from enforcing in any way the provisions of Kentucky Revised Statute s. 432.040, or from instituting or undertaking any proceedings whatsoever, pursuant to said statutes, against he plaintiffs herein, and

Exhibit F-1

b) ordering and directing the apropriate defendants, their agents, servants, employees and attorneys, and all others acting in concert with them, to turn over forthwith to the United States Marshal for the Eastern District of Kentucky, all property seized by them or persons operating under their control, supervision or direction from the home of the individual plaintiffs on the night of August 11-12, 1967; and

5. Such other and further relief to which plaintiffs may appear entitled.

Plaintiffs respectfully pray that the above relief be granted.

Respectfully submitted,

DAN JACK COMBS
COMBS AND ANDERSON
207 Carolina Avenue
Pikeville, Kentucky

(Verified by Plaintiff, Carl Braden, on August 16, 1967.)

APPENDIX A

APPLICABLE STATUTES

KRS s. 432.020:

Criminal syndication. Any person who commits, aids or counsels any crime, physical violence, destruction of property, intimidation, terrorism or other unlawful act

or method to accomplish any political end or to bring about political revolution shall be confined in the penitentiary for not more than twenty-one years, or fined not more than ten thousand dollars, or both.

KRS s. 432.030:

Sedition. Any person who advocates or suggests by word, act or writing any public disorder or resistance to, or the change or modification of, the government, Constitution or laws of the United States or of this state by force or violence or by any unlawful means shall be confined in the penitentiary for not more than twenty-one years, or fined not more than ten thousand dollars, or both.

KRS s. 432.040:

Teaching, publishing, joining society to advocate criminal syndication or sedition. Any person who by word or writing advocates, suggests or teaches the duty, necessity, propriety or expediency of criminal syndicalism or sedition, or who prints, publishes, edits, issues or knowingly circulates, sells, distributes, publicly displays or has in his possession for the purpose of publication or circulation any written or printed matter in any form advocating, suggesting or teaching criminal syndicalism or sedition, or who organizes or helps to organize, or becomes a member of or voluntarily assembles with any society or assemblage of persons that teaches, advocates or suggests the doctrine of criminal syndicalism or sedition shall be confined in the penitentiary for not more than twenty-one years, or fined not more than ten thousand dollars, or both.

Exhibit F-1

NOTICE OF MOTION

Plaintiffs hereby move for (1) the certification to the Chief Judge of the United States Court of Appeals for the Sixth Circuit of the necessity of convening a statutory three judge district court for the hearing and determination of this cause pursuant to the provisions of 28 U.S.C. 2281 and 2284; and (2) for the issuance of a temporary restraining order restraining defendant Ratliff from in any way prosecuting the individual plaintiffs for an alleged violation of K.R.S. s. 432.040 until the hearing and determination of this cause.

Respectfully submitted,

DAN JACK COMBS
COMBS & ANDERSON
207 Carolina Avenue
Pikesville, Ky.
Attorney for Alan McSurely
and Margaret McSurely

APPENDIX F-2

Intervening Complaint in the United States District Court for the Eastern District of Kentucky at Pikeville

(Filed—August 17, 1967)

1. Intervener is and at all times herein mentioned a citizen of the United States and the Commonwealth of Kentucky, and is a field director in Pike County, Kentucky for the Appalachian Volunteers, an organization funded by the United State Office of Economic Opportunity.

2. Defendant Thomas Ratliff, a citizen of the Commonwelath of Kentucky, is the duly elected and acting Commonwealth's Attorney for the 35th Judicial District, Pike County, Kentucky. In addition, he is the duly nominated Republican candidate for Lieutenant Governor in the forthcoming general election of November 1967. He is sued individually and in his official capacity.

3. Defendant Perry A. Justice, a citizen of the Commonwealth of Kentucky, is the duly elected and acting Sheriff of Pike County, Kentucky. He is sued individually and in his official capacity.

4. Defendant Grover Atkins, a citizen of the Commonwealth of Kentucky, is the duly elected and acting Jailer of Pike County, Kentucky. He is used individually and in his official capacity.

5. Defendant Robert L. Matthews, a citizen of the Commonwealth of Kentucky, is the duly elected and acting Attorney General for the Commonwealth of Kentucky, and, as such, the chief law enforcement officer thereof. He is joined in this action as a nominal and necessary party defendant and did not participate in any of the events hereinafter set forth. He is sued only in his official capacity.

Appendix F-2

JURISDICTION OF THE COURT

6. The jurisdiction of the Court over the complaint arises under Title 28 U.S.C. 1331(a), 1343(3)(4), 2201, 2202, 2281 and 2284; Title 42, U.S.C. 1971, 1981, 1983 and 1985, and under the Constitution of the United States, and in particular the First, Fourth, Fifth and Fourteenth Amendments thereto.

7. The amount in controversy, exclusive of interest and costs, exceeds the sum or value of $10,000.00.

THE CAUSE OF ACTION

8. The defendants herein, or some of them, under color of certain statutes of the Commonwealth of Kentucky, have entered into a plan or conspiracy with other persons to the plaintiffs unknown to subject or cause to be subjected the plaintiffs, citizens of the United States, to the deprivation of rights, privileges and immunities secured to them by the Constitution and laws of the United States.

9. Pursuant to this plan or conspiracy, the defendants, or some of them, have attempted to and threaten to continue to attempt to prosecute the individual plaintiffs under the color and authority of certain commonwealth statutes, namely, Kentucky Revised Statute 432:040, which, related statutes Kentucky Revised Statutes 432:020 and 432:030, is set forth in Appendix A hereto, and incorporated herein.

10. Defendant Ratliff and Justice, without any basis whatsover in law or fact, attempted to institute the prosecution of the individual plaintiffs by obtaining, on or about August 11, 1967, certain warrants of arrest charging them with the offense of violating KRS 432:040 simultaneously

therewith they obtained a search warrant of petitioner's home and seized property belonging to petitioner. These arrest and search warrants were served and acted upon by law enforcement officers of Pike County, Kentucky, under the control of the defendants herein, or some of them, who illegally and unlawfully seized property belonging to the individual and organizational plaintiffs.

11. Kentucky Revised Statute 432:040 is void and illegal on its face and as applied to the plaintiffs herein in that it violates the Constitution of the United States, and in particular the First, Fourth, Fifth, Eighth and Fourteenth Amendments thereto. This state statute violates the fundemental guarantees of free speech, press, assembly and the right to petition the government for redress of grievances. It violates the guarantee of due process of law in that it is vague and indefinite and fails to meet the requirement of certainty in criminal statutes. It violates the prohibitions against ex post facto legislation and bills of attainder and represents an unconstitutional degelation of legislative power, all in violation of the Constitution of the United States.

12. The aforesaid state statute is likewise void and illegal and of no force or effect in that it invades areas preempted to the exclusive jurisdiction of the United States by statutes and laws enacted by the Congress of the United States, and has been so held by the Court of Appeals of the Commonwealth of Kentucky in *Braden* v. *Commissioner, Ky.*, 291 S. W. 2d 843.

13. Pursuant to the aforesaid conspiracy and plan, the defendants, or some of them, have threatened and continue to threaten to enforce the said unconstitutional, void and

illegal state statute against the plaintiffs herein for the sole purpose of subjecting and causing to be subjected the plaintiffs, and the members, friends and supporters of the plaintiff organizations, to the deprivation of rights, privileges and immunities secured to them by the Constitution and laws of the United States.

14. Unless the Court restrain the operation and enforcement of this void, invalid and unconstitutional state statute, the plaintiffs and the members, friends and supporters of the plaintiff organizations will suffer immediate and irreparable injury.

The sole purpose, intention and effect of threatening to enforce said statute is to deter, intimidate, hinder and prevent the plaintiffs and the members, friends and supports of the plaintiff organizations from exercising their fundamental constitutional rights guaranteed under the First and Fourteenth Amendments in their efforts to enforce the equality under the law guaranteed by the Thirteenth, Fourteenth and Fifteenth Amendments.

Accordingly, unless this Court restrains the operation and enforcement of this void, invalid and unconstitutional state statute, the plaintiffs and the members, friends and supporters of the plaintiff organizations will continue to suffer the most serious, immediate and irreparable injury in that they will continue to be deterred, intimidated, hindered and prevented from exercising elementary and fundamental federal constitutional rights.

15. Plaintiffs have no adequate remedy at law.

Appendix F-2

WHEREFORE, plaintiffs pray for the following relief:

1. That pursuant to Title 28 U.S.C. 2281 and 2284 a three-judge federal district court be immediately convened to hear and determine this proceeding;

2. That a permanent injunction issue

a) restraining the appropriate defendants, their agents, servants, employees and attorneys and all other acting in concert with them from the enforcement, operation or execution of Kentucky Revised Statute s. 432:040, and

b) restraining the appropriate defendants, their agents, servants, employees and attorneys and all others acting in concert with them from impeding, intimidating, hindering and preventing the plaintiffs or members, friends and supporters of plaintiff organizations from exercising the rights, privileges and immunities guaranteed to them by the Constitution and laws of the United States, and

c) ordering and directing the appropriate defendants, their agents, servants, employees and attorneys and all others acting in concert with them to account to plaintiffs for the property seized from them or some of them from the home of the individual plaintiffs on the night of August 11-12, 1967, and to return said property forthwith to the appropriate plaintiffs.

3. That a Declaratory Judgment issue declaring that Kentucky Revised Statute s. 432:040 is void on its face and null and void as violative of the Constitution of the United States.

Appendix F-2

4. That pending the hearing and determination of the prayers for permanent relief, an interlocutory injunction issue

a) restraining the appropriate defendants, their agents, servants, employees and attorneys and all others acting in concert with them from enforcing in any way the provisions of Kentucky Revised Statute s. 432:040, or from instituting or undertaking any proceedings whatsoever, pursuant to said statutes, against the plaintiffs herein, and

b) ordering and directing the appripriate defendants, their agents, servants, employees and attorneys, and all others acting in concert with them, to turn over forthwith to the United States Marshal for the Eastern District of Kentucky, all property seized by them or persons operating under their control, supervision or direction from the home of the individual plaintiffs on the night of August 11-12, 1967; and

5. Such other and further relief to which plaintiffs may appear entitled.

Plaintiffs respectfully pray that the above relief be granted.

Respectfully submitted,

DAN JACK COMBS
COMBS AND ANDERSON
207 Carolina Avenue
Pikesville, Kentucky

APPENDIX G

Opinion of the United States District Court for the Eastern District of Kentucky at Pikeville

(Filed—October 18, 1967.)

Before: The HONORABLE BERT T. COMBS, Circuit Judge, and the HONORABLE BERNARD T. MOYNAHAN, JR., and the HONORABLE JAMES F. GORDON, District Judges.

OPINION

COMBS, Circuit Judge. Kentucky's sedition law was passed in 1920 in the aftermath of World War I and the Bolschevik Revolution in Russia. The law was amended slightly in 1922, otherwise it has remained unchanged through the years. As would be expected, the statute is broad and comprehensive. It was good politics to be against Communism. The Governor signed the bill but was fearful that it drew too much water. He publicly stated that it "goes far afield and far beyond syndicalism and sedition." He thought the courts would "take out of this law the sections which make it dangerous", and concluded with this statement: "Those who seek its [government] overthrow by force or violence, or those who counsel resistance to its laws by unlawful means must be destroyed, but the right of free speech is the blood-bought heritage of every citizen: it is the palladium of our liberties, and it must and shall be preserved."

Appendix G

Now, for the first time a section of the law is squarely presented for judicial determination. KRS 432.040.[1] Also presented for determination is whether Congress by legislation has preempted this field so as to give federal courts exclusive jurisdiction; and, should this Court enjoin a state court from proceeding with a prosecution brought under the statute.

The individual plaintiffs, Alan McSurely, Margaret McSurely, Joseph Mulloy, Carl Braden, and Anne Braden, are under indictment in the Pike County, Kentucky, Circuit Court for advocating sedition and criminal syndicalism. The defendants are Robert Matthews, Attorney General of Kentucky; Thomas B. Ratliff, Commonwealth's Attorney for the Pike County Circuit Court; Perry A. Justice, Sheriff of Pike County; and Grover Atkins, Jailer of Pike County.

Alan and Margaret McSurely, husband and wife, are field organizers for plaintiff Southern Conference Educational Fund, Inc., in Pike County, Kentucky. Alan McSurely is also a field organizer for the National Conference of New Politics and has distributed literature of Viet-

---

[1] KRS 432.040—Any person who by word or writing advocates, suggests or teaches the duty, necessity, propriety or expediency of criminal syndicalism or sedition, or who prints, publishes, edits, issues or knowingly circulates, sells, distributes, publicly displays or has in his possession for the purpose of publication or circulation any written or printed matter in any form advocating, suggesting or teaching criminal syndicalism or sedition, or who organizes or helps to organize, or becomes a member of or voluntarily assembles with any society or assemblage of persons that teaches, advocates or suggests the doctrine of criminal syndicalism or sedition shall be confined in the penitentiary for not more than twenty-one years, or fined not more than ten thousand dollars, or both.

nam Summer, both unincorporated associations and both plaintiffs here. Joseph Mulloy is a field representative for the Appalachian Volunteers, an organization funded primarily by the United States Office of Economic Opportunity. According to the McSurelys and Mulloy, their official duties are to investigate the socio-eco-political milieu of Pike County, "to inform the people of their rights," and to help local citizens "organize to overcome their problems."

Anne and Carl Braden, husband and wife, are directors of the Southern Conference Educational Fund.

On the night of August 11, 1967 under authority of warrant charging seditious activities against the United States and the Commonwealth of Kentucky in violations of KRS 432.040, officials of Pike County and their deputies arrested the McSurelys and Mulloy. The officials also seized and impounded 564 loose books,[2] twenty-six posters, and twenty-two boxes of books, pamphlets, and other private and published documents found in the McSurely home. They also impounded a suitcase of clothes and several personal items which were caught up in the whirlwind of the search.

The McSurelys, together with Southern Conference Educational Fund and Vietnam Summer, filed their complaint in the United States District Court for the Eastern District of Kentucky. They alleged that KRS 432.040 is on its face unconstitutional and asked (1) that a three judge district court be convened;[3] (2) that defendants be enjoined from

---

[2] Nearly all single copies except 290 copies of Matuson, FALSE WITNESS.

[3] 28 U.S.C. §§ 2281-2284.

prosecuting the plaintiffs in the state court; (3) for an interlocutory injunction pending determination of the request for permanent relief; and (4) that the seized material be impounded by a federal marshal.

Judge Moynahan sustained the motion to certify for designation of a three judge district court. He denied the motion for interlocutory injunction and the motion to impound the seized material. Joseph Mulloy was permitted to intervene as a plaintiff.

After the hearing before Judge Moynahan, the warrents were amended so as to eliminate the charge of sedition against the United States.

This Court was convened on September 1, 1967. The Kentucky Civil Liberties Union was permitted to tender its motion to intervene as amicus curiae and to submit a brief. At the hearing on September 1, the parties agreed to a stipulation of facts, and the Court fixed time for making up the pleadings and for the filing of briefs. No temporary injunction was issued but the defendant Ratliff agreed in open court that he would not prosecute the criminal action in the Pike County Court until final decision by this Court.

On September 8, the Attorney General of Kentucky filed his answer and motions. He moved that the action be dismissed for lack of jurisdiction and that, in the alternative, this Court stay its proceedings to await the exhaustion of state remedies. He also filed a general denial.

The news media continued to give the case wide publicity and spokesmen for both plaintiffs and defendants presented their arguments to the press and on national news programs.

Appendix G

On September 11, the Grand Jury of Pike County, acting under general instructions from the judge of that court, returned an indictment against the McSurelys, Mulloy, and Carl and Anne Braden, charging them with seditious activities against the Commonwealth of Kentucky and Pike County in violation of KRS 432.040. On the following day, the Bradens, who are residents of Louisville, Kentucky, made their appearance in Pike County and were arrested and placed in jail in default of bond. Plaintiffs then moved for an immediate hearing and renewed their motion for a temporary injunction. They also moved for a show cause order against the defendant Ratliff for contempt of court.

This Court held a second hearing on September 14, at which time the Bradens were allowed to intervene as plaintiffs. Testimony was given by the individual plaintiffs and by the defendant Ratliff. The testimony was to the effect that since the filing of the criminal prosecution against plaintiffs the people of Pike County are fearful of associating with them and it has become difficult for them to carry on their normal work; also that the publicity has jeopardized the position of the Appalachian Volunteers in obtaining funds from the Office of Economic Opportunity.

At the conclusion of the September 14 hearing we entered an order, Judge Moynahan dissenting, that KRS 432.040 is on its face unconstitutional; that the federal courts have exclusive jurisdiction of offenses of this nature; and that the Commonwealth of Kentucky and the Pike Circuit Court should be enjoined from proceeding further with the charges against the individual plaintiffs.

The statute in question is clearly unconstitutional under even the most flexible yardstick. It is too broad and too vague. It contravenes the First Amendment to the Consti-

tution of the United States because it unduly prohibits freedom of speech, freedom of the press, and the right of assembly. It fails to distinguish between the advocacy of ideas and the advocacy of action. It makes it a criminal offense merely to possess, with intent to circulate, literature on the subject of sedition. It imposes the penalty of imprisonment for advocating an unpopular political belief. It would turn the courts into a forum for argument of political theories with imprisonment the penalty for the loser. It contains no requirement of criminal intent. The unwary and the ignorant could be enmeshed in the dragnet as easily as the covert plotter.

One of the definitions of sedition in the 92 Act is, "the advocacy or suggestion by word, act, deed or writing . . . of the change of modification of the government of the United States or of the Commonwealth of Kentucky or of the constitution or laws of either of them . . . by means other than by lawful means . . ." Carroll's Kentucky Statutes, Baldwin's 1936 Revision. A person could thus be indicted for suggesting a change in the state or federal constitution "by means other than by lawful means." What is lawful would of necessity have to be decided by the presiding judge. This is a plain violation of the Sixth Amendment to the federal constitution which guarantees the right of the accused "to be informed of the nature and cause of the accusation." Under the Sixth Amendment a person cannot be charged merely with violating the law; the charge must be more specific.

For all these reasons KRS 432.040 violates basic constitutional guarantees which have been applied to the states through the Fourteenth Amendment for nearly half a century.

We are of the opinion that, even if the statute were constitutional, Congress has preempted this field and the federal courts have exclusive jurisdiction. *Pennsylvania* v. *Nelson,* 350 U. S. 497, 76 S. Ct. 477, 100 L. Ed. 640 (1956).

The criminal prosecution against these plaintiffs is pitched solely on the theory that they were engaged in a Communist conspiracy to overthrow the government of Kentucky and its subdivision, Pike County. This was made clear at the hearing on the motion for temporary injunction. There has been no suggestion of any other seditious activities. The case therefore falls squarely under the Smith Act,[4] the Internal Security Act,[5] the Communist Control Act,[6] and other Congressional acts on the subject of Communism.

There is disagreement in this country about the dangers of Communism and how to combat those dangers. As regards Communism, most of us are like the blind men from Indostan who learned about the elephant by each touching a different part of its anatomy. We know very little about the subject as a whole. On one point, however, everybody agrees: Communism is not a local movement. The Communist Control Act of 1954 declares "that the Communist party of the United States . . . is in fact an instrumentality of a conspiracy to overthrow the government of the United States . . ." An attempt to overthrow the government of Kentucky or even one of its subdivisions would pose such a threat to the government of the United States that the Congressional acts referred to above would immediately

---

[4] 28 U.S.C. § 2385.

[5] 50 U.S.C. § 781 *et seq.*

[6] 50 U.S.C. § 841 *et seq.*

become applicable. One of the absolutes in this country since the Civil War is that this is one nation indivisible. So goes the Pledge of Allegiance to the Flag recited by school children and by members of the Daughters of the American Revolution.

It is our view therefore that when a seditious activity is identified as a Communist conspiracy the Congressional acts on the subject require the invocation of the preemption doctrine, thus vesting exclusive jurisdiction in the federal courts. We do not think *Uphaus* v. *Wyman*, 360 U. S. 72, 79 S. Ct. 1040, 3 L. Ed. 2d 1090 (1959), holds differently. There the question was whether a state had the right to make its own investigation of subversive activities. The investigations presumably encompassed all subversive activities, not merely those of Communists. Here the offense has been isolated and the alleged perpetrators charged as members of a Communist conspiracy. Moreover, we are here talking about a prosecution, not an investigation—a prosecution for a conspiracy which Congress has recognized as constituting a threat to the country as a whole. The state must therefore give priority to the federal government for the prosecution of the alleged offenses. The warrants in this case were amended and the charges of sedition against the United States were dropped in an apparent effort to give the state court jurisdiction. We think the amendment of the warrants and the limitation of the subsequent indictment was a futile gesture. Jurisdiction of the offenses here charged is in a federal court.

The next question is whether this Court should enjoin the state court from proceeding further with the prosecution of these plaintiffs. It seems to us that *Dombrowski* v. *Pfister*, 380 U. S. 479, 85 S. Ct. 116, 14 L. Ed. 2d 22 (1964), is in point. The statute is an unduly broad and vague reg-

ulation of expression and enforcement of the statute would necessarily curtail activities which are privileged under the First Amendment.

It is difficult to believe that capable lawyers could seriously contend that this statute is constitutional. The indictment[7] follows the language of the statute and in our opinion fails to state an indictable offense. It too fails to make the distinction between advocacy of ideas and advocacy of action and is therefore insufficient. *Dennis* v. *United States,* 341 U. S. 494 (1950); *Noto* v. *United States,* 367 U. S. 290 (1960). In addition, the conclusion is inescapable that the criminal prosecutions were instituted, at least in part, in order to stop plaintiffs' organizing activities in Pike County. That effort has been successful. Not only has there been the "chilling effect" on freedom of speech referred to in *Dombrowski,* there has been in fact a freezing effect. The Governor has issued a public statement that federal funds to the Appalachian Volunteers should be discontinued. Plaintiff's possessions have been seized and impounded and they have been placed in jail. The Bradens, who originally had not been charged with any offense, were indicted and placed in jail after they attempted to render assistance to the other plaintiffs. Clearly, the criminal prosecutions have put a damper on plaintiffs' freedom of speech, as well as on others who might be in sympathy with their objectives.

Defendants rely on 28 U.S.C. §2883[8] as a prohibition against this Court enjoining the state court from proceed-

---

[7] Copy of indictment attached to this opinion as an appendix.

[8] 28 U.S.C. § 2283. A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or to effectuate its judgments.

ing with the criminal prosecution. We do not consider §2283 as a bar under the facts here shown. We are of the opinion that no proceeding was pending in the state court, within the meaning of §2283, at the time this suit was filed. The McSurelys and Mulloy had been arrested and their possessions had been seized. Also, they had executed bond to be amenable to the orders of the Pike Circuit Court. But no indictment had been returned, and under Kentucky law an indictment is a prerequisite to prosecution for this type of offense. Constitution of Kentucky §12; *Eisner* v. *Commonwealth, Ky.*, 375 S. W. 2d 825 (1964). If the grand jury had not subsequently returned an indictment, this controversy would have been relegated to the limbo of local history. The warrants served only to legalize the seizure of the material and to prevent the parties from fleeing the jurisdiction of the state court. In the interim, between the issuance of the warants and the return of the indictment, there was a legal hiatus.

The argument of the defendants on this point could not in any event apply to the Bradens; no warrants were issued prior to their indictment and the indictment was returned after this suit was filed.

Moreover, if we are right in our conclusion that the offenses with which these plaintiffs are charged fall within the purview of the Congressional enactments on the subject of Communism, then federal courts have exclusive jurisdiction and an injunction is necessary in aid of jurisdiction. *Hines* v. *Davidowitz*, 312 U. S. 52 (1941); *Capital Service, Inc.* v. *Labor Board*, 347 U. S. 501 (1954); *American Ins. Co.* v. *Lester*, 214 F. 2d 578 (4th Cir. 1954).

Defendants rely also on the doctrine of abstention. They contend that plaintiffs can raise the question of unconstitu-

tionality in the state court, with the right of appeal to the Kentucky Court of Appeals and then to the United States Supreme Court. We do not think this is adequate protection of plaintiffs' constitutional rights or the constitutional rights of others who would be affected by enforcement of this statute. The statute is so broad and sweeping that nothing short of rewriting it would bring it within permissible constitutional limits. It would be impossible to rehabilitate the statute in a single prosecution. A suit under the Kentucky declaratory judgment statute is not appropriate where proceedings involving the matter in issue are already pending. *Gibbs* v. *Tyree*, 287 Ky. 656, 154 S. W. 2d 732 (1941); *Schick* v. *Schick*, Ky., 240 S. W. 2d 533 (1951); *Pritchett* v. *Marshall*, Ky., 375 S. W. 2d 253 (1963). The indictment against plaintiffs certainly is pending even though it was returned after this case was filed.

Our attention has been called to a few Kentucky cases where the enforcement of a city ordinance has been enjoined by a state court. We do not consider those cases applicable here. They rest on their own peculiar facts.

We recognize the importance of the abstention doctrine as between federal and state courts and are reluctant to issue an injunction in this case. It is our conclusion, however, that failure to do so will result in irreparable injury to these plaintiffs and the deprivation of basic constitutional rights of others who might be caught in this statutory dragnet.

The motion for a permanent injunction is sustained.

The Honorable James F. Gordon, District Judge, concurs; the Honorable Bernard T. Moynahan, Jr., District Judge, dissents.

Appendix G

FORM 15 A. INDICTMENT (RCr 6.10)

PIKE CIRCUIT COURT
KRS 432.040

COMMONWEALTH OF KENTUCKY

vs.

CARL BRADEN, ANNE BRADEN, ALAN MCSURELY, MARGARET MCSURELY, JOSEPH MULLOY.

The grand jury charges:

On or about the 7 day of September 1967, And within 12 mo. before the Finding of this Indictment, in Pike County, Kentucky, the above named defendant(s) committed the offense of advocating, suggesting or teaching the duty, necessity, propriety or expediency of criminal syndicalism or sedition, or of printing, publishing, editing, issuing or knowing circulating, selling, or distributing, or having in their possession for the purpose of publication or circulation any written or printed matter in any form advocating, suggesting or teaching, criminal syndicalism or sedition, or of organizing or helping to organize, or becoming a member of a voluntarily assembling with any society or assemblage of persons that teaches, advocates, or suggests the doctrine of criminal syndicalism or sedition, committed in manner and form as follows, to-wit: The above named defendants, in Pike County and before the finding of this indictment did knowingly and feloniously, by word or writing, advo-

cate or suggest a duty, necessity, propriety and expediency of physical violence, intimidation, terrorism or other unlawful acts or methods to accomplish a political and or to bring about political revolution, and did advocate or suggest by word, act or writing, public disorder, or resistance to, or the change or modification of the Government, Constitution, and laws of the Commonwealth of Kentucky or its political subdivision, by force, violence or other unlawful means, and did knowingly circulate, sell, or distribute and did have in their possession for the purpose of publication or circulation, written or printed matter, advocating, suggesting and teaching criminal syndicalism, or sedition, or the change or modification of the Government of the Commonwealth of Kentucky or its political subdivisions by force or violence, or other unlawful means, and did become members of a society or assemblage, and did assemble with persons teaching, advocating or suggesting the doctrine of criminal syndicalism or sedition, or the overthrow change, or modification of the Government of the Commonwealth of Kentucky by force, violence or other unlawful means against the peace and dignity of the Commonwealth.

A True Bill

/s/ Monroe Deboard
Foreman

APPENDIX H

Order of the United States District Court for the Eastern District of Kentucky at Pikeville

(Filed—September 14, 1967.)

It is the Judgment of this Court that K.R.S. 432.040, under which the state criminal proceeding is based in this case, is upon its face overbroad, so vague and of such sweeping application as to run afoul of the provisions of the United States Constitution, which requires narrow and specific regulation in the field of protected activity.

We hold therefore that K.R.S. 432.040 is unconstitutional. We are further of the opinion that if K.R.S. 432.040 was constitutional, the Federal Government has preempted the law of sedition by enactment of the Smith Act, 18 U.S.C.A. 2385. We do not think the government of Pike County or the government of Kentucky can be overthrown without in part overthrowing the Government of the United States. Federal Courts therefore have exclusive jurisdiction in this field.

Being of the opinion that K.R.S. 432.040 is unconstitutional, we find under the circumstances of this case that *Dombrowski* v. *Pfister* is applicable and the doctrine of abstention is not applicable.

It appearing that the plaintiffs herein face imminent trial in the Pike Circuit Court, we are of the opinion that it is the duty of this Court to exercise its eqiutable power to prevent the trial from being held. It is therefore ordered and directed that the Commonwealth of Kentucky, and all courts of the Commonwealth, the defendants herein, and any and all persons acting in concert and accord with them be and they are hereby enjoined from taking any further

action or proceeding in any manner against these plaintiffs under the statute in issue herein—K.R.S. 432.040, or any change or indictment based on said statute.

The motion of the plaintiffs that this court find the defendant, Ratcliff, in contempt is denied.

The motion of the Commonwealth that this Court strike from plaintiffs' complaint as amended the reference to K.R.S. 432.040 and K.R.S. 432.030 is sustained.

The motion by the Commonwealth of Kentucky to dismiss this action as to it is overruled.

It is further ordered that the Intervening Plaintiffs, Carl Braden and Ann Braden, be released from the custody of the Pike County Jailer and Sheriff.

It is further ordered that all the plaintiffs be placed under bond to this Court in the amount of Five Thousand Dollars ($5,000.00) each on their own recognizance to make themselves amenable to the further orders of this Court.

It is further ordered that all books, papers, documents and other material now in the custody of the Commonwealth Attorney of Pike County, Ratcliff, reflected by the Inventory filed in this action continue to be held by him in safe keeping until final disposition of this case by appeal or otherwise.

This the 14th day of September, 1967.

BERT COMBS
Judge, United States Circuit Court
of Appeals, for the Sixth Circuit

JAMES H. GORDON
Judge, United States District Court
for the Western District of Kentucky

Appendix H

Judge Moynahan dissents from the foregoing order except that portion thereof which discusses the citation for contempt of Thomas B. Ratliff, in which portion of the order he concurs.

This the 14th day of September, 1967.

BERNARD T. MOYNAHAN, JR.
Judge, United States District Court
for the Eastern District of Kentucky

APPENDIX I-1

Subpoena Re: Thomas B. Ratliff

UNITED STATES OF AMERICA
CONGRESS OF THE UNITED STATES

To Commonwealth Attorney Thomas B. Ratliff, 35th Judicial District, Pike County, Kentucky, GREETING:

PURSUANT to lawful authority, you are hereby commanded to appear before the Senate Permanent Subcommittee on Investigations of the Committee on Government Operations of the Senate of the United States, on forthwith, 1967, at o'clock m., at their committee room 161 Old Senate Office Building, Washington 25, D. C., then and there to testify what you may know relative to the subject matter under consideration by said committee, and produce the records set forth in Schedule A, attached hereto and made a part hereof.

HEREOF FAIL NOT, as you will answer your default under the pains and penalties in such cases made and provided.

To .....to serve and return.

GIVEN under my hand, by order of the committee, this 16th day of October, in the year of our Lord one thousand nine hundred and sixty-seven.

J. M. MCCLELLAN
Chairman, Senate Permanent Subcommittee on Investigations of the Committee on Government Operations.

Appendix 1-1

SCHEDULE A

And produce all books, records, correspondence, documents, and other papers which belong to or were subponaed from Alan McSurely, Margaret McSurely, and Joseph Molloy, which are in the possession of the Commonwealth's Attorney of the 35th Judicial District, Pike County, Kentucky, as designated in Order 1146 of the United States District Court, Eastern District of Kentucky, Pikesville, dated September 14, 1967, which relate to or pertain to:

(1) Meetings, from April 5 through April 8, 1967, attended by Alan McSurely and Margaret McSurely as individuals or as members or employees of Southern Conference Educational Fund or the Southern Students Organizing Committee held at Nashville, Tennessee, with members of or employees of the Student Non-Violent Coordinating Committee and/or Stokely Carmichael, prior to the civil disturbances (riots) which occurred in Nashville, Tennessee, on or about April 8, 1967;

(2) All books, records, correspondence, documents, and other papers which relate to or are concerned with present or former membership in or empolyment by the Student Non-Violent Coodinating Committee for the period January 1, 1964, to date;

(3) All books, records, correspondence, documents, and other papers which relate to or are concerned with the membership in or employment by the Southern Conference Educational Fund of Alan McSurely and/or Margaret McSurely;

Appendix I-1

(4) All books, records, correspondence, documents, and other papers which relate to or are concerned with the membership in or employment by Marxist-Leninist organizations and/or the Communist Party, of Alan McSurely and/or Margaret McSurely;

(5) All books, records, correspondence, documents, and other papers which relate to or are concerned with membership in and the activities of the Progressive Labor Party, Students for a Democratic Society, Southern Students Organizating Committee, the Freedom Democratic Party of Mississippi, ACCESS, and JOIN, for the period January 1, 1964, to date;

(6) All books, records, correspondence, documents, and other papers which relate to or are concerned with membership in or employment by the National Conference for New Politics and Vietnam Summer, of Alan McSurely and/or Margaret McSurely for the period January 1, 1964, to date;

(7) All books, records, correspondence, documents, and other papers which relate to or are concerned with Alan McSurely's employment by Appalachian Volunteers;

(8) All books, records, correspondence, documents, and other papers which relate to or are concerned with the employment of Alan McSurely and/or Margaret McSurely by the United Planning Organization (UPO) in Washington, D. C., for the period January 1, 1964, to date.

APPENDIX I-2

Subpoena Re: Alan McSurely

UNITED STATES OF AMERICA
CONGRESS OF THE UNITED STATES

To Alan McSurely, GREETING:

PURSUANT to lawful authority, you are hereby commanded to appear before the Senate Permanent Subcommittee on Investigations of the Committee on Government Operations of the Senate of the United States, on forthwith, 1967, at · o'clock m., at their committee room 161 Old Senate Office Building, Washington 25, D. C., then and there to testify what you may know relative to the subject matter under consideration by said committee, and produce the records set forth in Schedule A, attached hereto and made a part hereof.

HEREOF FAIL NOT, as you will answer your default under the pains and penalties in such cases made and provided.

To .....to serve and return.

GIVEN under my hand, by order of the committee, this 16th day of October, in the year of our Lord one thousand nine hundred and sixty-seven.

J. M. MCCLELLAN
Chairman, Senate Permanent Subcommittee on Investigations of the Committee on Government Operations.

[Same schedule as is attached to App. I-1.]

APPENDIX I-3

Subpoena Re: Margaret McSurely

UNITED STATES OF AMERICA
CONGRESS OF THE UNITED STATES

To Margaret McSurely, GREETING:

PURSUANT to lawful authority, you are hereby commanded to appear before the Senate Permanent Subcommittee on Investigations of the Committee on Government Operations of the Senate of the United States, on forthwith, 1967, at o'clock m., at their committee room 161 Old Senate Office Building, Washington 25, D. C., then and there to testify what you may know relative to the subject matter under consideration by said committee, and produce the records set forth in Schedule A, attached hereto and made a part hereof.

HEREOF FAIL NOT, as you will answer your default under the pains and penalties in such cases made and provided.

To .....to serve and return.

GIVEN under my hand, by order of the committee, this 16th day of October, in the year of our Lord one thousand nine hundred and sixty-seven.

J. M. MCCLELLAN
Chairman, Senate Permanent Subcommittee on Investigations of the Committee on Government Operations.

[Same schedule as is attached to App. I-1.]

APPENDIX I-4

Subpoena Re: Archie Craft

UNITED STATES OF AMERICA
CONGRESS OF THE UNITED STATES

To Archie Craft, U. S. Marshal, Eastern District of Kentucky, Lexington, Kentucky, GREETING:

PURSUANT to lawful authority, you are hereby commanded to appear before the Senate Permanent Subcommittee on Investigations of the Committee on Government Operations of the Senate of the United States, on forthwith, 1967, at o'clock m., at their committee room 161 Old Senate Office Building, Washington 25, D. C., then and there to testify what you may know relative to the subject matter under consideration by said committee, and produce the records set forth in Schedule A, attached hereto and made a part hereof.

HEREOF FAIL NOT, as you will answer your default under the pains and penalties in such cases made and provided.

To .....to serve and return.

GIVEN under my hand, by order of the committee, this 16th day of October, in the year of our Lord one thousand nine hundred and sixty-seven.

J. M. MCCLELLAN,
Chairman, Senate Permanent Subcommittee on Investigations of the Committee on Government Operations.

[Same schedule as is attached to App. I-1.]

APPENDIX J

Motion of the United States for Leave to Appear as *Amicus Curiae*

(Filed—October 30, 1967)

The United States of America, by its attorneys, respectfully moves the Court for leave to file, as *amicus curiae*, the accompanying memorandum. As grounds for this motion, it is submitted that, in regard to the documents presently held by the Commonwealth Attorney under the Court's order of September 14, 1967, the decision of the Court on the pending motions of the plaintiffs and the request for instructions by the Commonwealth Attorney for Pike County involves the respect to be accorded by the judiciary to a Congressional subpeona when materials sought by Congress happen to be held under court order, a matter of importance to the proper functioning of the Federal Government.

Respectfully submitted,

Edwin L. Weisl, Jr.
Assistant Attorney General

George I. Cline
United States Attorney

Harland F. Leathers

Leslie A. Nicholson

Attorneys, Dept. of Justice

APPENDIX K

Notice of Appeal to the Supreme Court of the United States

(Filed—November 1, 1967)

1. Notice is hereby given that Alan McSurley, et al., the plaintiffs above named, hereby appeal to the Supreme Court of the United States from so much of the Order of the Court, entered in this action on October 30, 1967, as denies the motion of the plaintiffs to enjoin the defendants, above named, from releasing any of the materials seized by the defendants, said materials being the property of the plaintiffs, to the Permanent Sub-Committee on Investigations of the Senate Committee on Governmental Operations; and from so much of said order as directs the parties to this action and the officers of the Court to cooperate with the Senate Committee, above named, in making available to said Committee, such materials, or copies thereof, as the Committee considers pertinent to its inquiry.

2. This appeal is taken pursuant to 28 U.S.C. §1253.

William B. Kunstler
Arthur Kinoy
511 Fifth Avenue
New York, New York

Dan Jack Combs
207 Carolina Avenue
Pikeville, Kentucky
Attorney for the individual plaintiffs Alan and Margaret McSurley

Morton Stavis
744 Broad Street
Newark, New Jersey
Attorneys for all plaintiffs

APPENDIX L

Objections to the Validity of Subpoenas *Duces Tecum*

(Filed—November 15, 1967)

(Made pursuant to Order of the Supreme Court of the United States)

Pursuant to the order entered by the Supreme Court of the United States on November 10, 1967, the plaintiffs and the intervening plaintiffs hereby present the following objections to the validity of the subpoenas duces tecum issued by the Permanent Subcommittee on Investigations of the Committee on Government Operations of the United States Senate (hereinafter referred to as the "Senate Subcommittee"). The within objections are made by the plaintiffs to all the subpoenas duces tecum addressed to any of the parties hereto.

Plaintiffs McSurely are associated with the Southern Conference Educational Fund. In addition, plaintiff Alan McSurely was associated with the National Conference for New Politics. The intervening plaintiff Southern Conference Educational Fund is a non-profit membership corporation organized under the laws of the State of Tennessee, and maintaining offices in Kentucky. As stated by the Supreme Court of the United States, the said organization "is active in fostering civil rights for Negroes in Louisiana and other states of the South." *Dombrowski* v. *Pfister*, 380 U. S. 479, 482 (1965). The said organization attempts to secure to Negro citizens and other poor the rights guaranteed to them under the Federal Constitution and to participate in efforts to end all forms of segregation in the Southern states. The plaintiffs McSurely and McSurely, through association with the said organization and other

activities, have devoted themselves to improving the lot of Negroes and other poor guaranteeing their rights under the Constitution of the United States.

By reason solely of their activities aforesaid and for express purpose of preventing them from exercising their rights and protecting the rights of the Negro people and other poor people of Kentucky, attempts were made by the defendant Ratliff to prosecute plaintiffs McSurely and McSurely under a statute of the Commonwealth of Kentucky which this Court has found to be unconstitutional as violative of the First, Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States.

Plaintiffs assert that the subpoenas the subject matter of this action constitute a continuation of the harassment of them, solely for the reasons aforesaid, and are designed solely for the purpose of preventing plaintiffs from carrying out their activities as aforesaid and are designed further to deter other persons in the Commonwealth of Kentucky and elsewhere from engaging in like activities.

Plaintiffs assert that the subpoenas duces tecum are invalid for the reasons hereinafter set forth:

1. The subpoenas on their face are so broad, sweeping, and lacking in particularity as to constitute an unreasonable search and seizure and thereby violate plaintiffs' rights under the Fourth Amendment to the Constitution of the United States. The subpoenas as served are in language as broad as the traditional Writs of Assistance.

2. The subpoenas seek documents and records dealing directly with rights of the plaintiffs to freedom of expression and political association and freedom to hold opinions,

and the privacy thereof, and thereby violate plaintiffs' rights under the First Amendment to the Constitution of the United States.

3. The subpoenas are based upon knowledge wrongfully gained from an inspection of documents illegally and unlawfully seized by government officials and are therefore invalid. Agents and employees of the Senate Subcommittee have entered into a conspiracy with representatives of Pike County, Kentucky, wherein, notwithstanding knowledge on the part of all such conspirators that the seizure of documents by Pike County officials was unlawful, the said documents were covertly and surreptitiously made available to the Senate Subcommittee and said conspiracy and the fruits thereof are the basis for the subpoenas since served upon plaintiffs.

4. The records and documents referred to in the subpoenas are not relevant or material to the subject matter of any alleged inquiry by the Senate Subcommittee and the investigation sought to be made in respect to those records is beyond the scope of the said inquiry.

5. The resolution of the United States Senate purporting to authorize the inquiry currently under way by the Senate Subcommittee does not encompass the subject matter touched upon by the subpoenas served upon the plaintiffs nor the inquiry sought to be made with respect to those documents, nor does the said resolution authorize or empower the Senate Subcommittee to receive and act upon documents unlawfully seized by state officials and improperly turned over to staff of the Subcommittee.

6. The resolution of the United States Senate, if it is taken as purporting to authorize the instant inquiry by the Senate Subcommittee, does not authorize inquiry into opinions, affiliations, associations, membership, or political activities generally, all being matters protected by the First Amendment, and if the said resolution were to be interpreted as encompassing such matters the same would be unconstitutional under the First Amendment in that the same would purport to authorize an unlimited and compulsory examination of witnesses in the protected areas of speech, press, association, and assembly, in violation of both the procedural requirements of due process of the Fifth Amendment and the substantive requirements of the First Amendment.

7. The actions of the Senate Subcommittee in the issuance of these subpoenas violate the fundamental guarantees of freedom of speech, press, assembly, association, thought, and belief, the right of citizens to petition their government for redress of grievances, and the right of citizens to be secure in their houses, persons, and papers from unreasonable searches and seizures. The subpoenas of the Senate Subcommittee are overbroad and violate the due process rights of the plaintiffs. Their overbroad sweep inhibits and deters the exercise of the rights of freedom of speech, press, assembly, and association, in violation of the First Amendment. The dragnet sweep of the investigation and subpoenas and their overbreadth create a chilling effect upon the exercise of First Amendment rights by the people of the United States.

8. The delegation of authority by the United States Senate Subcommittee is so vague, ambiguous and uncertain that it cannot support or authorize any investigation of that

Subcommittee which may affect or deter citizens of the United States in their exercise of their rights of freedom of speech, press, assembly, or association, or may threaten the security of their persons, papers or property.

9. The conduct of the Senate Subcommittee from the inception of its so-called investigation has demonstrated that it is not conducting a *bona fide* investigation but in fact is using the instrumentality of an investigation to harass those whose views are at variance with views of the members of the Senate Subcommittee. The said conduct is particularly revealed in the instant case in that the action of the Senate Subcommittee has amounted to an effort to use its powers to continue a repressive prosecution by the defendant, Ratliff, the unlawful use of documents illegally seized by the defendant Ratliff, and the service of subpoenas flagrantly unconstitutional and overbroad. By its conduct aforesaid the Senate Subcommittee has made clear that it is attempting to deter persons who may disagree with it from exercising their right under the Constitution of the United States to urge a different point of view from that asserted by the Subcommittee and to use its powers to carry out a repressive prosecution found by this Court to have been unconstitutional. By reason of the conduct of the Subcommittee aforesaid it may not have the aid of this Court or of the subpoena process in implementing such a program.

WHEREFORE, plaintiffs move this Court:

a) To quash the subpoenas duces tecum issued by the Senate Subcommittee;

b) To direct the return of the documents heretofore unlawfully seized by the defendant Ratliff.

Appendix L

Plaintiffs further move that this Court set a hearing upon the within objections to consider the factual and legal contentions hereinabove set forth.

Respectfully submitted,

DAN JACK COMBS
207 Carolina Avenue
Pikeville, Kentucky

WILLIAM M. KUNSTLER
ARTHUR KINOY
511 Fifth Avenue
New York, New York 10017

MORTON STAVIS
744 Broad Street
Newark, New Jersey 07102
Attorneys for Plaintiffs
By: WILLIAM M. KUNSTLER

APPENDIX M

Plaintiffs' Motion for Evidentiary Hearing and Offer of Proof

(Filed—November 24, 1967)

Plaintiffs respectfully move the Court for an evidentiary hearing in the within cause at which they will offer oral testimony and documentary evidence to prove the following facts:

1. The backgrounds of each affected individual plaintiff are as follows:

a) *Alan McSurely*—Mr. McSurely, a native of Dayton, Ohio, is a white staff representative in Pikeville, Kentucky, for the Southern Conference Educational Fund (SCEF) in connection with its Southern Mountain Project, and a distributor of literature for Vietnam Summer and the National Conference for New Politics. His duties consist primarily of working with the poor black and white residents of Pike County, Kentucky, in order to organize them for the betterment of their economic condition. Moreover, for a brief period in the middle of 1967, he served as a correspondent to the Appalachian Volunteers and rented his house to that organization for one of its training sessions.

b) *Margaret McSurely*—Mrs. McSurely, a native of Ashland, Kentucky, is a former employee of the Student Nonviolent Coordinating Committee. Like her husband, she is a white staff representative of the Southern Conference Educational Fund (SCEF) and in that capacity performs duties identical to his in Pike County, Kentucky.

c) Joseph Mulloy, a native of Louisville, Kentucky, is a field representative with the Appalachian Volunteers, an organization which is funded principally by the United

States Office of Economic Opportunity (OEO). His duties include working with the poor residents of the Appalachian Mountain region of the United States in general and Pike County, Kentucky, in particular to assist them in organizing into community action groups and to furnish them with information as to their legal and other rights.

2. The nature and backgrounds of the organizational plaintiffs are as follows:

a) The Southern Conference Educational Fund (SCEF) a non-profit corporation, which has its principal office in Louisville, Kentucky, is a civil rights organization which has been actively engaged for many years in attempting to organize white and black people in the southern part of the United States with a view to obtaining freedom, equality and economic betterment for all Americans, regardless of race. In its programs SCEF relies strongly on, *inter alia* publications, assemblies and other methods of public dissemination of ideas.

b) Vietnam Summer (VS) which has its principal office in Cambridge, Massachusetts, is an unincorporated association which is primarily concerned with efforts to end the present American military involvement in South Vietnam. In its programs, VS relies strongly on, *inter alia* publications, assemblies and other methods of public dissemination of ideas.

c) National Conference for New Politics (NCNP) which has its principal office in New York, New York, is an unincorporated association which is primarily concerned with efforts to create new politics in the United States by virtue of which all Americans will eventually have some control

of the fundamental decision which affect their lives. In its programs, NCNP relies strongly on *inter alia,* publications, assemblies and other methods of public dissemination of ideas.

3. The Appalachian Mountain region of the United States consists primarily of the mountain areas of the States of Kentucky, Virginia and West Virginia. It is populated by white and a scattering of black residents who have what is perhaps the lowest per capita family income in the United States. The region, in which the anthracite coal industry predominates, is one which, in addition to abject poverty, is characterized by poor schooling, an almost total absence of recreational facilities for children or adults, and the continual exodus of young adults to other part of the country.

4. The plaintiffs or some of them, have for some time been publicly opposed to strip mining, which consists of stripping bare portions of mountain slopes and either extracting the coal with bulldozers (stripping) or boring it out with augurs (auguring) both practices which have scarred the east Kentucky landscape, created dangerous slide conditions, polluted the streams and ruined the available farm land.

In addition, the plaintiffs ,or some of them, have also opposed the use of the broad form deed which generations ago conveyed mineral rights in perpetuity to the coal mining interests. Strip miners who own such deed can bulldoze through growing crops to reach subterranean coal deposits without compensating the farmer concerned. Kentucky is the only American State which still regards these deeds as legal.

Appendix M

Plaintiff Molloy supported the highly publicized struggle of Jink Ray, a Pike County farmer, to prevent a strip miner armed with a broadform deed from bulldozing this property in July, 1967. With the help of Molloy and others, Ray successfully resisted the despoiling of his property. So effective was Ray's opposition that the governor of Kentucky was eventually forced to order the suspension of the strip miner's State license.

5. The secret meeting of August 11, 1967.

On the afternoon of August 11, 1967, defendant Ratliff, who has or had major coal mining interests and at one time was president of the local coal operators association, met with Robert Holcomb, the president of the Pike County Chamber of Commerce and of the National Independent Coal Operators Association which represents swell deep and strip-mine owners in fourteen States, and others in Pikeville, Kentucky. At this meeting, plans were made for the arrest of the individual plaintiffs and the seizure of their books, documents and other records. Later that afternoon, closed hearings were held in the Pike County Court House, the result of which arrest and search warrants were issued with respect to plaintiffs McSurely and Molloy. At all times on August 11, 1967, and prior thereto, defendants knew that the statute on which said warrants were based, viz KRS 432.040, had been declared preempted by federal legislation by the Supreme Court of Appeals of the Commonwealth of Kentucky in *Braden* v. *Commonwealth*, 291 S. W. 2d 843.

In addition to the above-mentioned defendant Ratliff, this meeting was attended by several members of the Fiscal Court among whom were the Sheriff, several leading Magistrates, several leading Republican citizens, and Harry East-

burn, the local poverty program director. The subject of this meeting was what should be done about the organizers in Pike County.

Pike County is the largest county in area east of the Mississippi. It is also the largest coal producing county in the country. However, at the present time, one-half of the work force is employed or has left the area, and one-third live on less than three thousand dollars a year. Due to competition from gas and oil as a commercial and domestic heating fuel, the coal producers have found it necessary to reduce their operation and output which has lead to the impoverishment of Pike County and other similar coal producing regions.

6. *The raids*

Late on the evening of August 11, 1967, a raiding party of about ten men, including defendants Ratliff and Justice entered the McSurely home. After search and arrest warrants for Margaret McSurely were hastily prepared by a justice of the peace accompanying the raiding party, the McSurelys were arrested and almost all of the books, documents and other records in their home confiscated and removed therefrom. Several hours later, the same scene took place at the Molloy home except that Molloy was handcuffed by the raiders. The arrested plaintiffs were subsequently incarcerated under high bond in the Pike County Jail. The raids are best described in Circuit Judge Combs' words:

> On the night of August 11, 1967, under authority of warrants charging seditious activity against the United States and the Commonwealth of Kentucky in violation of KRS 432.040, officials of Pike County

and their deputies arrested the McSurely and Molloy. The officials also seized and impounded 564 loose books, pamphlets and other private and published documents found in the McSurelys' home. They also impounded a suitcase of clothes and several personal items which were caught up in the whirl wind of the search.

Page 1-2, opinion of three-judge court.

7. *Senate Permanent Subcommittee on Investigation.*

Shortly after the raids, defendant Ratliff contacted, among others, agents of the Permanent Subcommittee on Investigations of the Senate Committee on Government Operations (The McClellan Committee). Athough both Ratliff and the McClellan Committee were aware of the unconstitutionality of KRS 432.040 and the illegal, unlawful and criminal nature of the arrest and search warrants issued thereunder, they unlawfully conspired by and between themselves to insure that certain portions of the material seized on the night of August 11, 1967, would be transferred to the custody of the said McClellan Committee.

The desire of the McClellan Committee in entering into said unlawful conspiracy was to secure the books, records, correspondence, documents and other papers relating to certain civil rights, peace, poverty and political organizations for the purpose of deterring, intimidating and discrediting the members, friends and supporters thereof and for no legitimate legislative purpose whatsoever. This end was to be accomplished by exposing members, friends and sympathizers to public scorn, ridicule and general harassment thereby discouraging potential supporters and hindering the effectiveness of ongoing programs carried on by

said organizations. The ability of said civil rights, peace, poverty and political organization to effectively carry out their programs and achieve their goals is dependent upon the fundamental right to private, secret membership in these said organizations. By exposing these members to public obliquy these organizations are thereby prevented from carrying out their lawful and legitimate programs.

These organizations, all of which utilize First Amendment freedoms, to obtain their objectives, are as follows:

a) Southern Conference Educational Fund, Inc., is a corporation organized under the laws of the State of Tennessee, domesticated and maintaining an office for business purposes in the Commonwealth of Kentucky, whose purpose is to help to secure to black and white American citizens the rights guaranteed to them under the Constitution of the United States and to end all forms of racial and economic segregation, discrimination and injustice in the interest of both black and white citizens of the Southern states.

b) Vietnam Summer is an unincorporated association, maintaining an office for business purposes in the Commonwealth of Massachusetts. It is designed to reach out to millions of Americans deeply troubled by the War in Vietnam, to find concerned men and women in the communities and neighborhoods across the nation, and to weld them into an organization and active constituency.

c) Mississippi Freedom Democratic Party is an unincorporated association maintaining an office for the conduct of business in the State of Mississippi. It is a political party open to membership by all who support its platform,

programs, purposes and activities without regard to race or color although it is presently composed of black citizens of the State of Mississippi. MFDP seeks to attain its primary goal freedom and equality for all black citizens of Mississippi by political organization, activities and programs directed thereto. In order to achieve freedom and equality for all Mississippians, irrespective of race, it utilizes the rights of freedom of speech, press, association and assembly and to petition for the redress to the Constitution of the United States.

d) National Conference for New Politics is an unincorporated association maintaining office for business purposes in the City and State of New York. Its primary purpose is to further and advance the growth of a new politics throughout the United States, a politics of ordinary people who want to control democratically the decisions that effect their own lives. In furtherance of its objectives, program and purposes, NCNP employs and engages in activities which are protected by the rights of freedom of speech, press, association and assembly and to petition for the redress of grievances, all of which are guaranteed by the First Amendment to the Constitution of the United States.

e) Southern Student Organizing Committee is "an association of young, concerned southerners dedicated to social change" through exercise of protected First Amendment rights to achieve a more representative democratic society. Its principal office is in Nashville, Tennessee.

f) Progressive Labor Party is a radical political party which engages in recognize political activities, such as running candidates for office and holding conventions and draft-

ing platforms for their political campaigns. Its principal headquarter is in New York, New York.

g) Student Nonviolent Coordinating Committee is an unincorporated association maintaining an office for business purposes in the City of Atlanta, Georgia, and whose purpose is to help to secure to all Negro citizens the rights guaranteed to them under the Constitution of the United States, and to end all forms of racial segregation and discrimination in the interest of Negro and white citizens throughout the United States. In support of these purposes SNCC, its staff and supporters engage in all forms of legitimate peaceful activities, including, but not limited to picketing, demonstrations, rallies, mass meetings, voter registration drives, community organization and publication. SNCC seeks to obtain its objectives through utilization of the fundamental rights of free speech, press and assembly, and the right to petition the government for the redress of grievances.

h) United Planning Organization is an umbrella anti-poverty agency for Washington, D. C. It is the primary funding agency for all community action projects in Washington, D. C.

i) Appalachian Volunteers is an Office of Economic Opportunity project, staffed by VISTA volunteers to work among the poor in the Appalachian Mountain which are located in the States of Kentucky, Virginia and West Virginia.

j) Action Coordinating Committee to End Segregation in the Suburbs is a private civil rights organization founded

in March, 1966, by Alan McSurely. Its purpose is to end segregation in the Washington, D. C. suburbs. Its headquarter is in Washington, D. C.

k) Jobs Or Income Now is a Students for Democratic Society project funded by private donations and contributions and in operation in the cities of Baltimore, Maryland, and Chicage, Illinois. It is a community action project intended to raise the economic standard of the disadvantage people in those cities.

l) Student for Democratic Society in a group of students organized nationally for the purpose of bringing about fundmental changes in the democratic institutions of American society through social and political action through the exercise of protected First Amendment right. Its principal headquarter is in Chicago, Illinois, and it has local chapters on campuses of colleges and universities throughout the nation.

m) Marxist-Leninist Organizations and/or The Communist Party are not sufficiently indentified for plaintiffs to state their purposes or function, and their inclusion in the subpeona was merely for the purpose of prejudicial coloration.

Moreover, the McClellan Committee, in its prejudgment of the cause of the disturbances in the black ghettoes of such communities as Detroit, Michigan, Newark, New Jersey, and Los Angeles, California, had determined to cast the blame therefor on some or all of the said organizations together with "Marxis-Leninist Organizations and/or The Communist Party." In the light of this prejudgment, it willingly entered into the said unlawful conspiracy with

defendants to take custody of the illegally and invalidly seized materials with full knowledge of the unconstitutional and criminal nature of its conduct in so doing.

On August 16, 1967, plaintiffs instituted a plenery federal action in this Court seeking an injunction restraining the enforcement of KRS 432.040 on the ground that it violated the Constitution of the United States. In addition, plaintiffs sought an order returning the materials seized on the night of August 11, 1967, to the rightful owners or custodian thereof. On August 17, 1967, the necessity for the convening a three-judge district court was ceritfied by the Chief Judge of this Circuit pursuant to the provision of 28 U.S.C. 2284. This Court was subsequently duly convened.

9. On September 1, 1967, at a hearing before this Court, defendant Ratliff agreed in open court not to take any further action with respect to plaintiffs until the deposition of their motions for temporary injunctive relief. It was further agreed by said defendant that the seized material would be inventoried and held in the joint custody of Ratliff and the United States Marshal for this district. This agreement was the result of plaintiffs' stated discovery that portions of the said material were being made available to other persons in Pike County, Kentucky.

10. On September 5, 1967, despite Ratliff's agreement in open court to take no further action with respect to plaintiffs, the charges against them were presented to a Pike County grand jury which, six days later, returned indictments under KRS 432.040 against the McSurelys and Molloy as well as against Carl and Anne Braden, the executive and assistant directors of SCEF. The Bradens were

subsequently incarcerated under high bond in the Pike County Jail.

11. On September 11, 1967, this Court, upon learning of the aforesaid indictments, scheduled a further hearing of this cause for September 14, 1967. Prior thereto, defendant Ratliff, in a belated effort to cure the potent invalidity of the arrest and search warrants amended them to delete any reference to the alleged overthrow by force and violence of the government of the United States and the Commonwealth of Kentucky, substituting therefore that of Pike County, Kentucky. At the conclusion of the said hearing, this Court issued a permanent injunction restraining the enforcement of KRS 432.040 on the grounds that it was (a) unconstitutionally vague and overbroad in the area of First Amendment freedoms and (b) preempted by federal legislation. It ordered the seized materials to remain in the joint custody of defendant Ratliff and the United States Marshal pending a possible appeal by defendant.

12. On or about October 14, 1967, no appeal having been filed, one of plaintiffs' attorneys demanded that defendant Ratliff release the seized material to his clients. Upon being informed by defendants, or some of them, that such a release could only be obtained by an order of this Court, plaintiffs began the preparation of an appropriate motion therefor. Defendants, or some of them, contacted the McClellan Committee and informed it of plaintiffs' plans to seek the said release order. The McClellan Committee, despite its knowledge of the illegality of the search and seizure which resulted in the possession by defendants of the said materials informed defendants, or some of them, that steps would be taken to make them unavailable to this

Court and the plaintiffs. Accordingly; on, or about October 16, 1967, by secret arrangement between the committee and the defendants or some of them, subpoenas *duces tecum* directed to the McSurelys, defendant Ratliff and the United States Marshal and pertaining to some of the seized material were issued and placed for service.

13. On October 18, 1967, plaintiffs motion for (a) a return of the seized material and (b) to enjoin the delivery thereof by defendant Ratliff and the United States Marshal to the McClellan Committee together with a request for a hearing thereon were served and filed. The United States immediately moved to intervene *amicus curiae* in opposition to plaintiffs' motions and in support of the subsequent motion of defendant Ratliff for a modification of this Court's judgment of September 14, 1967, so as to permit him to turn over the subpoenaed material to the McClellan Committee.

14. On October 30, 1967, without a hearing, this Court denied plaintiffs' motions and ordered that the illegally seized materials be turned over to agents of the McClellan Committee and that plaintiffs and their attorneys "cooperate" therewith. On November 11, 1967, this Court granted a temporary stay of its said order until 2 P.M. of the following day so that a further application for a stay could be presented to the United States Supreme Court or the Circuit Justice. The Supreme Court, on November 10, 1967, issued a *per curiam* order granting said stay provided plaintiffs filed objections to the said subpoenas *duces tecum* with this court on or before November 15, 1967, which they did within the requisite time.

Appendix M

15. The said subpoenas *duces tecum* were issued as a result of the unlawful conspiracy between defendants, or some of them, and the McClellan Committee. With full knowledge of the clear unconstitutionality of the searches and seizures of August 11, 1967, the defendants and the McClellan Committee unlawfully conspired together to prevent both the individual and organizational plaintiffs from recovering the material in question for the purpose of (a) intimidating, deterring and stigmatizing them, their members, friends and supporters, (b) preventing them from pursuing their political, poverty, peace and/or civil rights activities in eastern Kentucky and elsewhere and (c) furthering its prejudgment of the causes of the civil disturbances in the black ghettoes of the United States which it was purportedly investigating.

16. The said subpoenas *duces tecum* were fraudently, illegally and unlawfully structured in that (a) they were designed to and had the effect of projecting to the public at large in general and the Congress of the United States in particular the stereotype of political, peace, poverty and civil rights organizations as being subversive, (b) they constituted a fishing expedition designed to harass, impede, intimidate and deter political, peace, poverty and civil rights, the activities of plaintiffs, their members, supporters and friends and all other individuals and organizations included therein, (c) they constituted a writ of general assistance, (d) they continued and broadened a pattern and practice of congressional criminality in investigations of political, peace, poverty, civil rights and other organizations, (e) they were part and parcel of an unlawful conspiracy between the McClellan Committee and the Internal Security Subcommittee of the Senate Judiciary Committee

to harass, impede, deter and intimidate all of the organizations involved in said subpoenas *duces tecum* and the individuals associated in any way therewith, (f) they refer to organizations not in existence on January 1, 1964, the date of origin set forth therein.

17. The issuances and service of the said subpoenas *duces tecum* were designed by the said McClellan Committee and the defendants, or some of them, to have and did indeed have the effect of deterring, impeding, intimidating and harassing the plaintiffs as well as all of the organizations mentioned therein and others and chilling their exercise of their fundamental rights under the First Amendment to the Constitution of the United States. Moreover, the issuance and service of the said subpoenas were designed to have and did have the effect of denying to the affected organizations access to their files and records for the purposes of preventing or impeding their fulfilling their stated objectives, *inter alia*, of racial equality and freedom, the terminaiton of American military involvement in South Viet Nam, and the organizing of poor people in the Appalachian Mountain region and elsewhere in the United States. In addition, the issuance and service of the said subpoenas were designed to have and will have the effect, unless restrained by this Court, of exposing the identities of the contributors to and the friends, members, sympathizers and supporters of the plaintiff organizations and others to intimidation, economic retaliation, terrorism and harassment, all to the end and purpose of destroying the organizations in question or their activities.

In the event that the Court will not conduct an evidentiary hearing for the purpose of permitting plaintiffs to offer oral testimony and documentary proof of the fore-

going, plaintiffs herewith tender them as facts they would have proved had such a hearing been held.

No previous application for the relief requested herein has been made to this or any other Court except as stated above.

Respectfully submitted,

DAN JACK COMBS
207 Carolina Avenue
Pikeville, Kentucky

WILLIAM M. KUNSTLER
ARTHUR KINOY
511 Fifth Avenue
New York, New York 10017

MORTON STAVIS
744 Broad Street
Newark, New Jersey 07102
Attorneys for Plaintiffs
By: MORTON STAVIS

Appendix M

AFFIDAVIT

State of Louisiana
Parish of Orleans

Before me, the undersigned authority, came and appeared James A. Dombrowski, who after being duly swern, did depose and say;

That he resides at 715 Governor Nicholls Street, New Orleans.

That prior to his retirement February 1, 1966, he served for some twenty years as executive director of the Southern Conference Educational Fund, Inc. (SCEF), a Southwide interracial agency formerly based in New Orleans, but since February 1966 based in Louisville, Ky.

That in October 1963, police in New Orleans, acting under an unconstitutional statute (LRS §14:358-374) seized all of the records, papers, files, and other documents belonging to the SCEF and turned all of the SCEF property over to the Louisiana Joint Legislative Committee on Un-American Activities. Later all of this SCEF property was subpoenaed by the Internal Security Subcommittee of the Judiciary Committee of the United States Senate, and removed to Washington, D. C.

That as a result of this action, the SCEF was deprived of its financial records, check books, list of contributors, mailing list of its newspaper, correspondence files, personal papers, etc. Naturally, under such conditions the corporation was virtually paralyzed, and unable to function or to fulfill its obligations.

That the SCEF records were ordered returned (380 U. S. 479) only after years of costly litigation. Meanwhile

scores of letters of a confidential nature, taken from the SCEF files, were made available to the news media, causing irreparable injury to the persons concerned. Furthermore, when the records were returned, they were in such a state of confusion and disorder as to be practically useless. Certain valuable documents never were found.

That this seizure of SCEF's records not only caused irreparable loss to the corporation, but forced the SCEF staff to endure months of cruel mental stress, and more importantly, caused great numbers of people to be so frightened and intimidated, that they hesitated to join in the work of the agency aimed at the practical realization of constitutionally protected rights and privileges.

That now the SCEF is threatened with a repetition of this disastrous action of October 1963, as another Senate investigative committee is seeking to gain possession of SCEF papers and records seized in Kentucky under another unconstitutional statute (KRS 432.040).

That unless such action is halted, it can be confidently predicted on the basis of his own agonizing experience, that further irreparable injury again will be inflicted upon SCEF and upon the great body of plain, ordinary citizens, black and white, throughout the South who look to the SCEF for assistance in their struggle to claim their constitutionally protected rights and privileges.

JAMES A. DOMBROWSKI

Sworn to and subscribed before
me this 21st day of November 1967.
BENJAMIN A. SCOTT

APPENDIX N

Motion of the United States to Intervene

(Filed—November 24, 1967)

The United States of America, by its attorneys, moves to intervene pursuant to Rule 24 of the Federal Rules of Civil Procedure in support of the validity of the subpoenas issued by the Permanent Subcommittee on Investigations of the Committee on Government Operations of the United States Senate.

As grounds for this motion, it is submitted that the United States has a direct interest in this action insofar as the objections filed by the plaintiffs herein to the validity of the subpoenas issued by the Permanent Subcommittee on Investigations of the Committee on Government Operations of the United States Senate are concerned. These objections not only challenge the validity of actions taken by the United States Senate Committee on Government Operations and its Permanent Subcommittee on Investigations, but also challenge the validity of Senate Resolution 150 of the 90th Congress, 1st Session.

In further support of this motion to intervene, the Court is respectfully referred to the affidavit of Senator John L. McClellan, dated November 22, 1967, filed herewith and incorporated herein by reference. The Court is also respectfully referred to the Memorandum of the United States In Support of the Validity of the Subpoenas Issued By the Senate Permanent Subcommittee on Investigations filed herewith.

Respectfully submitted,

EDWIN L. WEISL, JR.
Assistant Attorney General

Appendix N

GEORGE I. CLINE
United States Attorney

LESLIE A. NICHOLSON
Attorney, Department of Justice

(Copies of subpoenas attached to Government's Motion to Intervene omitted.)

AFFIDAVIT BY JOHN L. MCCLELLAN

John L. McClellan, having been duly sworn, states as follows:

1. I am a member of the United States Senate for the State of Arkansas and have been since 1942. Since 1955, I have been Chairman both of the Senate Committee on Government Operations and of the Permanent Subcommittee on Investigations of the Committee on Government Operations.

2. Attached hereto as Exhibit A is a copy of the statement which I made on Wednesday, November 1, 1967, in connection with the hearings presently being held by the Permanent Subcommittee on Investigations of the Committee on Government Operations sometimes referred to herein as the Subcommittee.

3. Attached hereto as Exhibit B is a copy of the report of the Assistant Chief Clerk of the Committee on Government Operations detailing the approval by the Committee on Government Operations of Senate Resolution 150, prior to the amendment and approval of that resolution by the

Senate Committee on Rules and Administration and unanimous approval by the Senate.

4. Attached hereto as Exhibit C is a copy of a letter dated August 12, 1967, in which the duty of carrying out the directions of Senate Resolution 150, 90th Congress, 1st Session, was duly delegated to the Senate Permanent Subcommittee on Investigations of the Committee on Government Operations.

5. Attached hereto as Exhibits D, E, F, and G are one copy each of the subpoenas issued on October 16, 1967, by the Senate Permanent Subcommittee on Investigations of the Committee on Government Operations, to Alan McSurely, Margaret McSurely, Archie Craft and Thomas B. Ratliff,

6. The Permanent Subcommittee on Investigations has received sworn testimony during public hearings that the riots which occurred in Nashville, Tennessee, on April 8, 1967, and thereafter, were instigated, precipitated or encouraged by individuals identified as members, employees, or affiliates by individuals identified as members, employees, or affiliates of the Student Non-Violent Coordinating Committee, the Southern Conference Educational Fund, the Southern Students Organizing Committee and the Communist Party or other Marxist- Leninist organizations. The Subcommittee has also received sworn testimony that Alan McSurely and Margaret McSurely, the plaintiffs in this proceeding, attended a meeting or meetings from April 5 through 8, 1967, in Nashville, Tennessee, with Stokely Carmichael and/or members, employees, or affiliates of the Student Non-Violent Coordinating Committee, the Southern Conference Educational Fund, and the Southern Students Organizing Committee.

Appendix N

7. The investigatory staff of the Subcommittee has received information from various sources including the Commonwealth Attorney for Pike County, Kentucky, Thomas L. Ratliff, which information has not yet been the subject of sworn testimony before the Subcommittee, indicating that individuals identified as members, employees, or affiliates of the following organizations have been involved to some extent in causing the riots and other disturbances set forth in Senate Resolution 150: the Students for a Democratic Society, the National Conference for New Politics, Vietnam Summer, the Freedom Democratic Party of Mississippi, Access, Join, Appalachian Volunteers, and the United Planning Organization.

8. From the foregoing, it is clear that the materials sought by the Subcommittee mentioned above (Exhibits D, E, F, and G) are highly pertinent to the investigation authorized by Senate Resolution 150.

JOHN L. MCCLELLAN

(Sworn to November 22, 1967.)

Appendix N

SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS

OF

THE COMMITTEE ON GOVERNMENT OPERATIONS

Opening Statement of Senator John L. McClellan (D., Ark.), Chairman, on Wednesday, November 1, 1967, in connection with hearings on Riots, Civil and Criminal Disorders

Today the Subcommittee begins hearings on one of the most disturbing internal problems which has faced our country in recent years.

The United States Senate, recognizing the grave national crisis created by urban rioting, unanimously voted on August 11, 1967, to examine thoroughly the riots in our cities and their concomitant elements of violence and vandalism.

Senate Resolution 150, 90th Congress, 1st Session, authorized and directed the Committee on Government Operations or any duly authorized Subcommittee thereof to make a full and complete study and investigation of riots, violent disturbances of the peace, vandalism, civil and criminal disorders, insurrection, the commission of crimes in connection therewith, the immediate and long-standing causes, the extent and effects of such occurrences and crimes, and measures necessary for their immediate and long-range prevention and for the preservation of law and order and domestic tranquility within the United States. The Senate also authorized and directed a full and complete study and investigation of all other aspects of crime and lawlessness within the United States which have an impact upon or affect the national health, welfare and safety.

Appendix N

The Committee on Government Operations delegated the authority given by the Senate to the Senate Permanent Subcommittee on Investigations. The Subcommittee immediately initiated its investigation into the riots and civil disturbances that have inflicted upon our peaceful society acts of violence and lawlessness on a scale and in a pattern unprecedented in our history. Callous and deliberate disregard for law and order, spurred on by inflammatory speeches and proclamations of those who publicly advocate the use of violence as a means toward accomplishment of their objectives, have reached proportions that may well constitute a tangible threat to the preservation of law and order and our internal security.

Our preliminary investigation indicates that, since January of 1964, approximately 140 cities in the United States have suffered eruptions of violence, generally accompanied by numbers of serious crimes against persons or property. Many of these outbreaks of lawlessness have had their origin in racial unrest. According to the data complied during the Subcommittee's inquiry, more than 100 disturbances in approximately 80 of these cities can be classified as major civil disorders.

Preliminary investigation indicates that the causes of some of these riots are complex and may be indeterminable. We believe, however, that they can be classified generally into two categories: (1) the immediate causes that sparked the disorders and rioting, and (2) the long-range causes which involve complaints and grievances relating to unsatisfactory conditions prevailing in many of our urban centers.

The Subcommittee intends to examine primarily into the immediate causes as its first step in this investigation. We

will ascertain and study the facts concerning each riot insofar as it is practicable to do so, in order to determine the causes, extent and effect of the civil disorders and rioting in each community. We want the facts to speak for themselves.

We will undertake to determine whether the outbreaks were spontaneous or if they were instigated and precipitated by the calculated design of agitators, militant activists or lawless elements. We will seek to find out of genuine grievances did exist which led to the outbreak of disorder or rioting. If there was instigation, we hope to find whether it was organized on a national level, on a local level, or if it was completely unorganized.

We must face certain unpleasant facts. It is apparent that a new philosophy has flourished in recent years, having as its central theme the theory that we are no longer a nation of laws. In several fields, and particularly in the civil rights movement, there has been for some time a rapid increase in the number of civil disorders, sit-ins, unruly protest marches, disorderly demonstrations, and violations of law. It appears that many persons who in the past have condoned or sponsored willful civil disobedience have now taken the next step in advocating criminal force and violence.

Law and order is today being threatened and the structure of our peaceful society is being undermined by a philosophy which contends that each man should be free to violate the laws which he considers unjust. We must therefore recognize that accelerated civil disobedience will sweep us swiftly down the road to chaos and anarchy.

The development of facts about the immediate causes of the riots is logically the first step in this investigation.

Appendix N

We need to know what happened and who was involved before we undertake to examine in depth the fundamental and basic causes of urban rioting. It is important to establish these facts before we can undertake an examination of the social and economic causes which may have generated dissatisfaction and unrest that culminated in the disorders and rioting that our nation has recently experienced. These must be taken into consideration and in due course we will call witnesses who are experts on the relevant social and economic factors.

During the past year, another Subcommittee of the Committee on Government Operations, the Subcommittee on Executive Reorganization, under the able chairmanship of Senator Abraham Ribicoff, held extensive hearings on the various problems of urban affairs. That Subcommittee examined conditions in our cities in great detail and heard much testimony which will be very helpful to us in the task in which we are now engaged. I shall propose that we incorporate by reference in the record of these hearings the several printed volumes, totalling more than 4,000 pages, of the hearings of that Subcommittee chaired by the distinguished Senator from Connecticut, Senator Ribicoff. That record includes the testimony of nationally known sociologists, psychiatrists, public officials, and urban experts. This testimony will aid us materially and will eliminate unnecessary duplications in the trmendous volume of evidence that we expect to compile in the course of these hearings.

I shall also propose that the printed record of the hearings held earlier this year before the Senate Committee on the Judiciary, relating to H.R. 421—the Anti-riot Bill, 1967—be incorporated by reference into the record of these hearings.

Appendix N

The Subcommittee may well undertake to examine other aspects of the disorders and rioting in addition to those which I have already enumerated. For example, there are allegations that the coverage of demonstrations and rioting by news media, particularly the television industry, has frequently had an inflammatory impact upon susceptible elements of our people.

We have received complaints that televisioncamera crews in cities where riots were in progress frequently gave intensive coverage to incidents of violence and scenes of arson and looting, and that local television stations devoted large segments of their news programs to these scenes. Thus it is argued that as a result of the excitement engendered by these films of violence and by the showing of frenzied exhortations by apparent leaders of the mobs, other riots were sparked and ignited in cities within television range of the large city where the pictures originated. This was certainly a phenomenon observed in connection with the riot in Detroit, which was quickly followed by riots in Flint, Pontiac, Saginaw, Grand Rapids, and other cities in Michigan and Ohio. When extensive coverage of the Newark rioting was broadcast in the New Jersey area, riots soon broke out in Plainfield, Elizabeth, Englewood, Jersey City, and other nearby cities.

We have received complaints from police and urban officials that the television cameras seldom film and the stations rarely show attacks upon policemen, firemen, and other officials on the scene, but that the cameras become more active when the police move to subdue their attackers or to disperse with force the unruly mobs that are perpetrating violence.

Appendix N

We will consider complaints and alleged grievances relating to conditions which are said to underlie the outbreaks of violence, including unemployment, violations of civil rights, charges of police brutality, and the adequacy of housing, educational and recreational facilities and relief and welfare programs.

The Subcommittee has had teams of investigators working in various urban areas of the United States since the inquiry began. Their work has resulted in the selection for study of a group of cities which give a fair cross-section of riot activity. We will initially hear testimony about the riots which occurred in Houston, Texas, in May of 1967.

We begin these hearings under no illusions that our work can be finished at any early date, but we shall proceed as expeditiously as possible. We may not have unanimity of opinion at all times, and it is unlikely that all interests will be pleased and satisfied with our labors. However, we shall go forward in the hope and expectation that ultimately we will be able to submit to the Congress a report that will substantially reflect the truth and that will contain sound and valid recommendations with respect to legislative remedies.

POLL OF PERMANENT SUBCOMMITTEE ON INVESTIGATIONS AND COMMITTEE ON GOVERNMENT OPERATIONS JULY 31, 1967

On July 31, 1967, the members of the Permanent Subcommittee on Investigations were polled by Chairman John L. McClellan to secure approval to report an original resolution authorizing the Subcommittee to make a full and complete study and investigation of riots, violent disturb-

ances of the peace, vandalism, civil and criminal disorder, insurrection, the commission of crimes in connection therewith, the causes, extent, and effects of such occurrences and crimes, and measures necessary for their prevention and for the preservation of law and order and to insure domestic tranquility within the United States.

The following subcommittee members approved such a resolution:

Senators:

Henry M. Jackson
Sam J. Ervin, Jr.
Edmund S. Muskie
Abraham Ribicoff
Fred R. Harris
Karl E. Mundt
Carl T. Curtis

The members of the full committee, who are not members of the Subcommittee on Investigations, were also polled, and the following full committee members approved the proposed resolution:

Senators:

Robert F. Kennedy
Lee Metcalf
Joseph M. Montoya
Clifford P. Hansen
Howard H. Baker, Jr.

Signed letters of approval are attached.

Ann M. Grickis
Assistant Chief Clerk

Appendix N

UNITED STATES SENATE

Committee on Government Operations

August 12, 1967

Senator John L. McClellan, Chairman
Committee on Government Operations
United States Senate
Washington, D. C.

Dear Mr. Chairman:

I hereby delegate to the Senate Permanent Subcommittee on Investigations of the Committee on Government Operations the duty of carrying out the directions of Senate Resolution 150, 90th Congress, First Session, which was passed by the Senate on August 11, 1967.

Sincerely yours,

JOHN L. MCCLELLAN
Chairman

APPENDIX O-1

Stipulation of Facts

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for all parties hereto that:

1. Defendant Ratliff announced publicly on or about August 11, 1967, or immediately thereafter substantially to the effect that the seized material would be made available to Congressional Committees.

2. Some time shortly after the decision of this Court on September 14, 1967, Lavern Duffy, Assistant Counsel to the Permanent Subcommittee on Investigations of the Senate Committee on Government Operations (hereinafter referred to as the McClellan Committee), telephoned defendant Ratliff and asked if he Ratliff had the aforesaid seized material in his possession. Ratliff answered in the affirmative.

3. The aforesaid telephone call represented the only contact between Mr. Duffy and defendant Ratliff.

4. On Sunday, October 8, 1967, John Brick, an investigator for the McClellan Committee, visited defendant Ratliff and Thadeus Scott, Commonwealth's Detective, and made known to them his official capacity.

5. Mr. Brick thereupon asked defendant Ratliff whether the aforesaid seized material contained any references to an alleged meeting in Nashville, Tennessee between April 5 and April 8, 1967 at which representatives of the Southern Conference Educational Fund, the Southern Student Organizing Committee and the Student Non-Violent Co-

ordinating Committee, including Stokely Carmichael, were present. Mr. Ratliff replied in the affirmative.

6. Mr. Brick thereupon asked defendant Ratliff specifically whether there was any information in the aforesaid seized material relating to the Southern Conference Educational Fund, the Southern Student Organizing Committee, Students for a Democratic Society, the Student Non-Violent Coordinating Committee, the Progressive Labor Party, Marxist Leninist Organizations, the Communist Party, the Mississippi Freedom Democratic Party, the National Conference for New Politics, the United Planning Organization and the Appalachian Volunteers. Mr. Ratliff replied in the affirmative.

7. Mr. Brick thereupon asked defendant Ratliff whether the aforesaid seized material contained any references to other organizations, none of which are named in the subpoena involved herein. Mr. Ratliff replied in the affirmative as to some and in the negative as to others.

8. On the evening of October 8, 1967, defendant Ratliff accompanied by Mr. Scott visited Mr. Brick in the Land Mark Motel in Pikeville, Kentucky. After some discussion among the three Mr. Scott and Mr. Ratliff left Mr. Brick's room together. Mr. Scott returned some time later bringing with him a number of manila folders containing xeroxed copies of the seized documents. Mr. Scott thereupon departed from the said motel room and Mr. Brick examined the xeroxed material for approximately two hours.

9. On the morning of October 9, 1967, by prearrangement, Mr. Scott picked up Mr. Brick at the Landmark

Motel and conveyed him by automobile to the Pike County Court House. Mr. Brick brought with him the xeroxed material which Mr. Scott had furnished to him the night before and returned it to Mr. Scott. Mr. Scott and Mr. Brick, upon arrival at the Pike County Court House found Mr. Herman Dotson, Assistant Commonwealth's Attorney who opened a locked door to a room for approximately one hour.

10. On October 9, 1967, after inspecting the aforesaid seized material, Mr. Brick proceeded to the United States Post Office in Pikeville, Kentucky, where, in the Clerk's Office, he inspected the file of this action. After inspecting the said file, Mr. Brick asked the aforesaid Clerk to mail to him at his office in Washington, D. C. a copy of the final order of September 14, 1967, and of the inventory attached thereto, which documents he received several days later.

11. On October 12, 1967, Mr. Brick returned to the Pikeville County Court House where, again accompanied by Messrs. Dotson and Scott, he entered the room in which the seized material was kept and examined same for approximately four hours. For the first time, Mr. Brick took notes of the contents of the said material.

12. Mr. Brick thereupon returned to Washington, D. C., where on October 16, 1967, at the personal direction of Senator John L. McClellan, he prepared the subpoenas involved herein. He thereupon took the said subpoenas to Senator John L. McClellan, Chairman of the McClellan Committee, with whom he had conferred on the subject matter thereof since October 6, 1967. After some discussion with Senator McClellan, four subpoenas were signed

and returned to Mr. Brick for further action. True copies of said subpoenas are attached to the affidavit of Senator McClellan dated November 22, 1967. No subpoena was ever issued or addressed to plaintiff Mulloy.

13. Mr. Brick thereupon left Washington, D. C. on the evening of October 16, 1967, and arrived in Louisville, Kentucky, and after arriving in that city, served defendant Ratliff with the appropriate subpoena. Mr. Brick thereupon left Louisville, Kentucky, for Lexington, Kentucky, where, on the afternoon of October 17, 1967, he served United States Marshal Archie Craft with the appropriate subpoena. Prior to said service, Mr. Brick contacted United States District Judge, Bernard T. Moynahan, Jr., by telephone and informed him that he, Mr. Brick, was in the State of Kentucky, for the purpose of serving said subpoenas concerning the said seized material upon Messrs. Ratliff, Craft, McSurely, and Mrs. McSurely.

14. On October 18, 1967, at 8:25 a.m., Mr. Brick served Alan and Margaret McSurely with the appropriate subpoenas at their home in Pikeville, Kentucky.

15. Alan and Margaret McSurely attended a meeting of the Board of Directors of the Southern Conference Educational Fund held at the Methodist Board of Evangelism Building in Nashville, Tennessee, between April 6 and April 8, 1967. Attached hereto and made a part hereof is a copy of the minutes of said meeting as prepared by Clarice T. Campbell, Secretary.

Attorney for the United States

Attorneys for Plaintiffs

Attorney for Defendants
Ratliff, Justice & Adkins

Appendix O-1

SOUTHERN CONFERENCE EDUCATIONAL FUND, INC.

Minutes of the
Board of Directors Meeting
Nashville, Tennessee, April 6-8, 1967

The Board of Directors of the Southern Conference Educational Fund, Inc., assembled at the Methodist Board of Evangelism Building in Nashville for its semi-annual meeting April 6-8, 1967. During the course of the meeting the following members of the Board and Advisory Committee were in attendance; Mr. John Beecher, Ala.; Miss Ruby Berkley, Miss.; Mr. J. N. Blankenship, La.; Mrs. Clarice T. Campbell, Miss.; Miss Alice Cobb, Tenn.; Dr. George R. Edwards, Ky.; Mrs. Elizabeth Foote, La.; Bishop Charles F. Golden, Tenn.; Mr. Edward Hamlett, Tenn.; the Rev. Edwin King, Miss.; Mrs. Rosalyn Laventhal, La.; Dr. Jack McMichael, Ky.; Dr. Everett W. MacNair, Ala.; Miss Dorcas Ruthenburg, Ky.; Mr. J. R. Rutter, Tenn.; the Rev. Fred L. Shuttlesworth, Ala.; Mrs. Modjeska M. Simkins, S.C.; Miss Wanda Whitman, N. C.; and the Rev. James A. Zellner, Fla. Guests present were Miss Catherine B. Stevens and Mrs. Barbara Beecher. Staff members included Directors Carl and Anne Braden, Mr. Robert Analavage, Miss Ella Baker, Miss Joy Fenston, the Rev. W. Howard Melish, Mr. Jack Brady, Mr. Jack Minnis, Mr. Bob Zellner, Miss Nessa Goatley, Mrs. Theresa Bridges, Al and Margaret McSurely and Barbara Bloomfield.

Pres. Shuttlesworth called the meeting to order at 7:30 Thursday evening. Dr. Melish gave the opening prayer. Moved, seconded, and carried that the minutes of the October, 1966, meeting be accepted as mailed.

RESIGNATIONS: Mr. E. L. James of West Virginia, 75 years of age, says he is no longer able to attend meetings

(he has since been killed in an auto wreck); Mr. Alfred Maund of D. C. cannot give the time or money to attend meetings (he has since gone to Arabia to teach). Moved, seconded, and carried that these resignations be accepted with regret. The Director was asked to invite Mr. Maund to be a member of the Advisory Committee.

ELECTIONS: The following persons, having previously indicated their willingness to serve, were elected to the Board of Directors subject to their acceptance in writing: The Rev. S. M. Davis, president of COAPO Ala.; Dr. Jacqueline J. Jackson on scholarship at Durham, N. C.; Dr Milton Reid, Va., and Mrs. Lucretia Ward, secretary of Kentucky Christian Leadership Conference.

RESOLUTIONS COMMITTEE: The president appointed Mrs. Laventhal, chairman, Miss Fenston, Dr. Edwards, Dr. King, Dr. Melish, and Dr. MacNair to the Resolutions Committee and asked that they have resolutions drawn up and ready for discussion on Friday.

Mr. Stokely Carmichael, in Nashville to speak at Vanderbilt, met with the Board in a closed session Friday morning. He explained his position on the need for black power in politics and economics: In the last twenty years the gap between the income of blacks and whites has doubled.

[Attachment to Stipulation of Facts]

Laws have been enacted which create an image of improvement but coalition groups have not had enough power to implement them. Unless blacks have power, any coalescence with whites works to the advantage of the whites. For power, blacks must organize. Integration, if it occurs, will be a by-product rather than the end sought. Follow-

ing Mr. Carmichael's talk was a lively question—and—answer period.

SEMINAR ON LAW ENFORCEMENT AND COURT DECISION: Moved, seconded and carried that SCEF ask other civil rights organizations to cooperate in sponsoring a seminar on law enforcement and the implementation of the court decision which upheld the HEW guidelines for school desegregation.

STAFF CONDUCT: Moved, seconded, and carried that the Executive Directors advise the staff members of the conduct which the Board expects of them.

TREASURER'S REPORT was presented by Miss Ruthenburg and accepted by the Board. Income has been less than anticipated. The Associate Director explained that moving from New Orleans had been costly and had usurped time which might otherwise have been used for fund raising. But probably of even more importance is the increase in local civil-rights organizations which solicit money. This was interpreted to be a desirable situation and perhaps even evidence of SCEF's success in stirring local people to action. Nevertheless, the finances of SCEF are critical and require stringent economies.

BUDGET: Moved, seconded, and carried that the budget as proposed by the Executive Directors be adopted as a goal but limited by the availability of funds with the proviso that the reserve investment account should not go below $20,000.

NEW YORK OFFICE: Dr. Melish reported that the dinner featuring Julian Bond was televised and the New Yorker reported it in the April 1 issue. Desk space has been given to the National Committee for Free Elections in Missis-

sippi. Women's Strike for Peace makes use of the office equipment. Dr. Melish believes the services of the New York office have doubled since it moved out of his home.

RECEPTION: Friday evening SCEF and friends were the guests of Mr. & Mrs. David Benson at 831 Kirkwood, Nashville.

RESOLUTIONS drawn up by the committee were discussed and accepted with some amendments. Vanderbilt University and Pres. Frank Rose of the University of Alabama were commended for maintaining freedom of discussion on vital issues; frequent killings of Negroes by Birmingham police were decried; satisfaction with the 5th Circuit Court's decision making enforcement of HEW guidelines in education mandatory was expressed and citizens were urged to implement the decision at the local level; support of Stokely Carmichael's right to dissent was given; Martin Luther King, Jr.'s linking of violence against Negroes with violence in Vietnam was commended: the Justice Department was urged to send voting officials to Sunflower County for the May 2nd election; effective laws for the regulation of dynamite and explosives were urged; and opposition was expressed to the continued persecution of Thomas Wansley in Virginia.

Pres. Shuttlesworth, having left to catch a plane, Bishop Golden took the chair for the final discussion concerning a place to hold the next meeting. No firm decision could be made until it was known whether places suggested were available to us. However, it was the consensus that a camp ground where all could be kept together would be advantageous. Anyone who knew of such an available place was asked to report it to the Executive Director.

The meeting was adjourned with prayer Saturday noon.

CLARICE T. CAMPBELL
Secretary

APPENDIX O-2

Further Stipulation of Facts

IT IS HEREBY STIPULATED AND AGREED by the parties represented by the attorneys below that:

1. Mr. Brick, if called upon to testify as to the sources of the information upon which the subpoenas involved herein were based, would state that, in addition to information acquired by examination of the seized materials themselves, they would include information received prior to his first contact with defendant Ratliff; some of which information has now been made public in the McClellan Committee hearings. As to that information which has not been made public, he would refuse to divulge its sources, pursuant to Rule 30 of the Standing Rules of the Senate.

2. Copies of some of the seized documents were made available to Mr. Brick prior to the issuance of the subpoenas and are presently in the possession of the McClellan Committee.

3. Without admitting the validity of inclusiveness thereof, the United States is willing to stipulate that representatives of the organizations listed in the subpoenas involved herein would testify, if called, that the purposes and programs of their organizations are as set forth in the complaint filed herein and/or the Plaintiffs' Motion For An Evidentiary Hearing and Offer Of Proof.

Attorney for Department of Justice

Attorney for the United States

Attorneys for Plaintiffs

Dated:

December 5, 1967
Lexington, Kentucky

APPENDIX P

Notice of Appeal to the Supreme Court of the United States

(Filed—December 18, 1967)

1. Notice is hereby given that Alan McSurely, et al., the plaintiffs above named, hereby appeal to the Supreme Court of the United States from so much of the Order of the Court, entered in this action on December 13, 1967 overruling objections of the plaintiffs to the subpoena duces tecum of the Senate Committee and directing the defendant Ratliff to comply with the subpoena duces tecum of the Senate Committee by allowing said Committee representatives to photograph copies of any of the desired books, papers, documents and other materials now in his possession under order of this Court.

2. This appeal is taken pursuant to 28 U.S.C. § 1253.

WILLIAM B. KUNSTLER
ARTHUR KINOY
Attorneys for plaintiffs
511 Fifth Avenue
New York, New York

DAN JACK COMBS
207 Carolina Avenue
Pikeville, Kentucky
Attorney for the individual plaintiffs Alan and Margaret McSurely

MORTON STAVIS
744 Broad Street
Newark, New Jersey
By MORTON STAVIS

APPENDIX Q-1

Senate Resolution 150

90TH CONGRESS, 1ST SESSION

IN THE SENATE OF THE UNITED STAES

JULY 31, 1967

Mr. MCCLELLAN, from the Committee on Government Operations, reported the following resolution; which was referred to the Committee on Rules and Administration

AUGUST 1, 1967

Reported, under authority of the order of the Senate of July 31, 1967, by Mr. JORDAN of North Carolina, with amendments

AUGUST 11, 1967

Considered, amended, and agreed to

RESOLUTION

Resolved, That (a) Senate Resolution 53, Ninetieth Congress, first session, agreed to February 17, 1967, is amended by inserting therein, immediately after section 3 thereof, the following new sections:

"SEC. 4. The Committee on Government Operations or any duly authorized subcommittee thereof is authorized and directed until January 31, 1968 to make a full and complete study and investigation of all other aspects of crime and lawlessness within the United States which have an impact upon or affect the national heath, welfare, and safety.

Appendix Q-1

"SEC. 5. The Committee on Government Operations or any duly authorized subcommittee thereof is authorized and directed until January 31, 1968, to make a full and complete study and investigation of riots, violent disturbances of the peace, vandalism, civil and criminal disorder, insurrection, the commission of crimes in connection therewith, the immediate and longstanding causes, the extent and effects of such occurrences and crimes, and measures necessary for their immediate and long-range prevention and for the preservation of law and order and to insure domestic tranquillity within the United States.

"SEC. 6. The Committee on Government Operations or any of its duly authorized subcommittees shall make an interim report to the Senate on the investigations authorized and directed by sections 4 and 5 hereof no later than October 2, 1967.

"SEC. 7. Sections 4, 5, and 6 of Senate Resolution 53, Ninetieth Congress, first session, agreed to February 17, 1967, are hereby redesignated as sections 8, 9, and 10, respectively."

(b) Section 6 of such resolution relating to the expenditures of the committee thereunder (redesignated as section 10 by this resolution) is amended by striking out "$435,000", and inserting in lieu thereof "$585,000".

APPENDIX Q-2

Senate Resolution 53

90TH CONGRESS, 1ST SESSION

IN THE SENATE OF THE UNITED STATES

JANUARY 24, 1967

Mr. MCCLELLAN, from the Committee on Government Operations, reported the following resolution; which was referred to the Committee on Rules and Administration

FEBRUARY 2, 1967

Reported by Mr. JORDAN of North Carolina, with an amendment

FEBRUARY 17, 1967

Considered, amended, and agreed to

RESOLUTION

Resolved, That, in holding hearings, reporting such hearings, and making investigations as authorized by section 134 of the Legislative Reorganization Act of 1946 and in accordance with its jurisdiction under rule XXV of the Standing Rules of the Senate, the Committee on Government Operations or any subcommittee thereof is authorized from February 1, 1967, through January 31, 1968, to make investigations into the efficiency and economy of operations of all branches of the Government, including the possible existence of fraud, misfeasance, malfeasance, collusion, mismanagement, incompetence, corrupt or unethical practices, waste, extravagance, conflicts of interest, and the

improper expenditure of Government funds in transactions, contracts, and activities of the Government or of Government officials and employees and any and all such improper practices between Government personnel and corporations, individuals, companies, or persons affiliated therewith, doing business with the Government; and the compliance or noncompliance of such corporations, companies, or individuals or other entities with the rules, regulations, and laws governing the various governmental agencies and its relationships with the public: *Provided,* That, in carrying out the duties herein set forth, the inquiries of this committee or any subcommittee thereof shall not be deemed limited to the records, functions, and operations of the particular branch of the Government under inquiry, and may extend to the records and activities of persons, corporations, or other entities dealing with or affecting that particular branch of the Government.

SEC. 2. The Committee on Government Operations or any duly authorized subcommittee thereof is further authorized from February 1, 1967, to January 31, 1968, inclusive, to conduct an investigation and study to the extent to which criminal or other improper practices or activities are, or have been engaged in in the field of labor-management relations or in groups or organizations of employees or employers, to the detriment of interests of the public, employers, or employees, and to determine whether any changes are required in the laws of the United States in order to protect such interests against the occurrence of such practices or activities. Nothing contained in this resolution shall affect or impair the exercise by the Committee on Labor and Public Welfare of any power, or the discharge by such committee of any duty, conferred or imposed upon it by the Standing Rules of the Senate or by the Legislative Reorganization Act of 1946.

Appendix Q-2

SEC. 3. The Committee on Government Operations or any duly authorized subcommittee thereof is further authorized and directed from February 1, 1967, to January 31, 1968, inclusive, to make a full and complete study and investigation of syndicated or organized crime which may operate in or otherwise utilize the facilities of interstate or international commerce in furtherance of any transactions which are in violation of the law of the United States or of the State in which the transactions occur, and, if so, the manner and extent to which, and the identity of the person, firms, or corporations, or other entities by whom such utilization is being made, what facilities, devices, methods, techniques, and technicalities are being used or employed, and whether or not organized crime utilizes such interstate facilities or otherwise operates in interstate commerce for the development of corrupting influences in violation of the law of the United States or the laws of any State and, further, to study and investigate the manner in which and the extent to which persons engaged in organized criminal activities have infiltrated into lawful business enterprise; and to study the adequacy of Federal laws to prevent the operations of organized crime in interstate or international commeree; and to determine whether any changes are required in the laws of the United States in order to protect the public against the occurrences of such practices or activities. Nothing contained in this resolution shall affect or impair the exercise by the Committee on the Judiciary or by the Committee on Commerce of any power, or the discharge by such committee of any duty, conferred or imposed upon it by the Standing Rules of the Senate or by the Legislative Reorganization Act of 1946.

Appendix Q-2

SEC. 4. The Committee on Government Operations or any of its duly authorized subcommittees shall report to the Senate by January 31, 1968, and shall, if deemed appropriate, include in its report specific legislative recommendations.

SEC. 5. (a) For the purposes of this resolution, the Committee on Government Operations or any of its duly authorized subcommittees, from February 1, 1967, to January 31, 1968, inclusive, is authorized, as it deems necessary and appropriate, to (1) make such expenditures from the contingent fund of the Senate; (2) hold such hearings; (3) sit and act at such times and places during the sessions, recesses, and adjournment periods of the Senate; (4) administer such oaths; (5) take such testimony, either orally or by sworn statement; (6) employ on a temporary basis such technical, clerical, and other assistants and consultants; and (7) with the prior consent of the executive department or agency concerned and the Committee on Rules and Administration, employ on a reimbursable basis such executive branch personnel as it deems advisable; and, further, with the consent of other committees or subcommittees to work in conjunction with and utilize their staffs, as it shall be deemed necessary and appropriate in the judgment of the chairman of the committee or subcommittee; *Provided further,* That the minority is authorized to select one person for appointment and the person selected shall be appointed and his compensation shall be so fixed that his gross rate shall not be less by more than $2,300 than the highest gross rate paid to any other employee.

(b) For the purpose of this resolution the committee, or any duly authoribed subcommittee thereof, or its chair-

man, or any other member of the committee or subcommittee designated by the chairman, from February 1, 1967, to January 31, 1968, inclusive, is authorized, in its or his or their discretion, as may be deemed advisable, to require by subpena or otherwise the attendance of such witnesses and production of such correspondence, books, papers, and documents.

SEC. 6. Expenses of the committee under this resolution, which shall not exceed $435,000, shall be paid from the contingent fund of the Senate upon vouchers approved by the chairman of the committee.

APPENDIX Q-3

Rules of Procedure for the Senate Permanent Subcommittee on Investigations, Readopted by the Full Committee on Government Operations

JANUARY 24, 1967

1. No major investigation shall be initiated without approval of either a majority of the Subcommittee or a majority of the full Committee on Government Operations. However, preliminary inquiries may be initiated by the Subcommittee staff with the approval of the Chairman of the Subcommittee.

2. Subpenas for attendance of witnesses and the production of memoranda, documents, and records shall be issued by the Subcommittee Chairman or by any other Member of the Subcommittee designated by him.

3. The Chairman shall have the authority to call meetings of the Subcommittee. This authority may be delegated by the Chairman to any other Member of the Subcommittee when necessary. The Chairman shall not schedule any hearings or series of hearings outside the District of Columbia without giving at least 48 hours' notice thereof to the Members of the Subcommittee.

No public hearing shall be held if the minority Members unanimously object, unless the full Committee on Government Operations by a majority vote approve of such public hearing.

4. Should a majority of the membership of the Subcommittee request the Chairman in writing to call a meeting of the Subcommittee, then in the event the Chairman

should fail, neglect, or refuse to call such meeting within 10 days thereafter, such majority of the Subcommittee may call such meeting by filing a written notice thereof with the Clerk of the Subcommittee, who shall promptly notify in writing each Member of the Subcommittee.

5. For public or executive sessions, any two Members of the Subcommittee shall constitute a quorum for the administering of oaths and the taking of testimony in any given case or subject matter. With the permission of the Chairman and the ranking minority Member, one Member of the Subcommittee shall constitute a quorum for the administering of oaths and the taking of testimony in any given case or subject matter, in public or executive sessions, effective until January 31, 1968.*

6. All witnesses at public or executive hearings who testify to matters of fact shall be sworn.

7. Counsel retained by any witness and accompanying such witness shall be permitted to be present during the testimony of such witness at any public or executive hearing, and to advise such witness while he is testifying, of his legal rights. Provided, however, that any Government officer or employee being interrogated by the staff or testifying before the Committee and electing to have his personal counsel present shall not be permitted to select such counsel from the employees or officers of any governmental agency. This rule shall not be construed to excuse a witness from testifying in the event his counsel is ejected for contumacy or disorderly conduct; nor shall this rule be construed as authorizing counsel to coach the witness,

* Amendment June 3, 1965, extended on January 24, 1967.

answer for the witness, or put words in the witness' mouth. The failure of any witness to secure counsel shall not excuse such witness from attendance in response to subpena.

8. Any witness desiring to read a prepared or written statement in executive or public hearings shall file a copy of such statement with the counsel or Chairman of the Subcommittee 24 hours in advance of the hearings at which the statement is to be presented. The Subcommittee shall determine whether such statement may be read or placed in the record of the hearing.

9. A witness may request, on grounds of distraction, harassment, or physical discomfort, that during his testimony, television, motion picture, and other cameras and lights shall not be directed at him, such request to be ruled on by the Subcommittee Members present at the hearing.

10. An accurate stenographic record shall be kept of the testimony of all witnesses in executive and public hearings. The record of his own testimony whether in public or executive session shall be made available for inspection by witness or his counsel under Committee supervision; a copy of any testimony given in public session or that part of the testimony given by the witness in executive session and subsequently quoted or made part of the record in a public session shall be made available to any witness at his expense if he so requests.

11. Interrogation of witnesses at Subcommittee hearings shall be conducted on behalf of the Subcommittee by Members and authorized Subcommittee staff personnel only.

Appendix Q-3

12. Any person who is the subject of an investigation in public hearings may submit to the Chairman of the Subcommittee questions in writing for the cross-examination of other witnesses called by the Subcommitte. With the consent of a majority of the Members of the Subcommittee present and voting, these questions shall be put to the witness by the Chairman, by a Member of the Subcommittee or by Counsel of the Subcommittee.

13. Any person whose name is mentioned or who is specifically identified, and who believes that testimony or other evidence presented at a public hearing, or comment made by a Subcommittee Member or counsel, tends to defame him or otherwise adversely affect his reputation, may (*a*) request to appear personally before the Subcommittee to testify in his own behalf, or, in the alternative, (*b*) file a sworn statement of facts relevant to the testimony or other evidence or comment complained of. Such request and such statement shall be submitted to the Subcommittee for its consideration and action.

14. All testimony taken in executive session shall be kept secret and will not be released for public information without the approval of a majority of the Subcommittee.

15. No Subcommittee report shall be released to the public without the approval of a majority of the Subcommittee.

16. All staff members shall be confirmed by a majority of the Subcommittee. After confirmation, the Chairman shall certify staff appointments to the Financial Clerk of the Senate, in writing.

Appendix Q-3

17. The minority shall select for appointment to the Subcommittee staff a Chief Counsel for the minority who shall, upon being confirmed, work under their supervision and direction; who shall be kept fully informed as to investigations and hearings, have access to all material in the files of the Subcommittee, and, when not otherwise engaged, shall do other Subcommittee work.

One clerk on the Subcommittee staff, acceptable to it, shall be assigned to the minority. When not otherwise engaged such Clerk shall be assigned other duties for the Subcommittee.

APPENDIX R

Notice of Appeal to Court of Appeals for the Sixth Circuit

(Filed February 9, 1968*)

NOTICE is hereby given that Alan McSurely, Margaret McSurely, Southern Conference Educational Fund, Inc., The National Conference for New Politics, and Vietnam Summer, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Sixth Circuit from so much of the Order of the Court entered in this action on December 13, 1967, as overrules the objections of the plaintiffs to the subpoena duces tecum of the Senate Subcommittee and directs the defendant Ratliff to comply with the subpoena *duces tecum* of the said Subcommittee by allowing said Subcommittee representatives to photograph copies of any of the desired books, papers, documents and other materials now in his possession under order of this Court.

WILLIAM B. KUNSTLER
ARTHUR KINOY
511 Fifth Avenue
New York, New York 10017

DAN JACK COMBS
207 Carolina Avenue
Pikeville, Kentucky

MORTON STAVIS
744 Broad Street
Newark, New Jersey 07102
Attorneys for appellants
By: MORTON STAVIS
Morton Stavis

* This document having been filed on February 9 does not appear in the record filed with the court since the record was transmitted prior to that date.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1113

ALAN MCSURELY, ET AL., APPELLANTS

v.

THOMAS B. RATLIFF, ET AL., APPELLEES

ON APPEAL FROM THE DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

MOTION TO DISMISS

In light of this Court's prior decision to grant the stay requested by appellants, we assume that the Court has determined that at least some of the questions raised by appellants are substantial. Thus, we shall address ourselves solely to the question whether this Court has jurisdiction to hear this case under 28 U.S.C. 1253.

On August 11, 1967, officials of Pike County, Kentucky, arrested the McSurelys under a warrant charging seditious activities in violation of a Kentucky statute (Ky. Rev. Stat. 432.040). In connection with the arrests, the officials seized numerous books, pamphlets and documents. Invoking the doctrine of

291-611—68

Dombrowski v. *Pfister,* 380 U.S. 479, the McSurelys brought an action in the federal district court to enjoin the prosecution. On September 14, 1967, a three-judge district court held the statute unconstitutional on the grounds of vagueness and federal preemption, and enjoined the prosecution. The court's order further directed the Commonwealth Attorney to hold the material in safekeeping during the 60-day appeal period.

On October 16, 1967, while the appeal period was still running, subpoenas calling for the production of certain of the seized documents were issued by the Permanent Subcommittee on Investigations of the Senate Committee on Government Operations. Copies of the subpoenas were served on the McSurelys and the Commonwealth Attorney. Shortly thereafter, the McSurelys moved the court for an order prohibiting the Commonwealth Attorney from turning over the documents to the Subcommittee, and requiring him to return them immediately. The United States appeared as an *amicus curiae* to oppose the motion. On October 30, 1967, the three-judge district court overruled the McSurelys' motion and directed the Commonwealth Attorney to comply with the Subcommittee's subpoena.

The McSurelys thereupon applied to this Court for a stay. They asserted that the decision of the district court which ordered the Kentucky Attorney General to comply with the Subcommittee's subpoena deprived them "of the legal rights they would otherwise have to resist legislative subpoenas *duces tecum*" (Appellants' Application For Emergency Relief, filed No-

vember 2, 1967, p. 4). In response, we stated that "the Committee has no purpose to prevent the applicants from securing a judicial determination of any defenses which they may have" (Memorandum of the United States on Application for Emergency Relief, p. 2). Recognizing that appellants could not test the subpoenas by contempt because the documents were not in their possession, we suggested that appellants be given an opportunity to file their objections to the subpoenas in the district court. On November 10, 1967, this Court entered an order granting appellants five days in which to file with the district court their objections to the subpoenas. On November 15, 1967, appellants did so, and on December 13, 1967, the three-judge district court overruled their objections. This appeal is from that order.

We agree that the three-judge court was properly convened to pass upon appellants' application to enjoin the Kentucky prosecution. However, we believe that an examination of the procedural history leads to the conclusion that, under the holding of *Commission* v. *Brashear Lines*, 312 U.S. 621, appellants' subsequent challenges to the Subcommittee's subpoenas should have been decided by the single district judge. Therefore, we conclude that appellants' appeal from the decision sustaining the subpoenas lies to the court of appeals and not to this Court.

In *Commission* v. *Brashear Lines, supra,* certain truck operators had filed suit in the federal court to enjoin enforcement of allegedly unconstitutional features of the Missouri Bus and Truck Law. A single district judge granted a temporary restraining order,

under which the truck operators were required to post bonds, and set the matter down for hearing before a three-judge court. After the three-judge court ruled that the statute in question was constitutional and vacated the restraining order, the Public Service Commission filed a motion seeking an assessment against the truck operators and their sureties for damages resulting from the restraining order. In passing on the propriety of having the three-judge court consider that motion, this Court stated:

> We are of the opinion that the two judges called in under § 266 to assist the district judge in passing upon the application for injunction should not have participated in consideration of the motion to assess damages. The limited statutory duties of the specially constituted three judge District Court had been fully performed before the motion for assessment of damages was filed. For § 266 of the Judicial Code provides for a hearing by three judges, instead of one district judge, only in connection with adjudication of a very narrow type of controversy—applications for temporary and permanent injunctions restraining state officials from enforcing state laws or orders made pursuant thereto upon the ground that the state statutes are repugnant to the Federal Constitution. The motion for damages raised questions not within the statutory purpose for which the two additional judges had been called. Those questions were therefore for the consideration of the District Court in the exercise of its ordinary jurisdiction, and the three judge requirement of § 266 had no application. [312 U.S. at 625.]

We perceive no adequate basis for distinguishing the situation in the present case from that in *Brashear*. Here the "limited statutory duties of the specially constituted three judge District Court" were concluded when that court entered its order holding the Kentucky sedition statute unconstitutional and enjoining the prosecution of appellants. The present controversy as to the validity of the Subcommittee's subpoenas has nothing to do with enjoining the operation of a State statute and thus has no substantial relationship to the purpose for which the three-judge court was convened. Indeed, the dispute here involves parties other than those involved in the action to enjoin the enforcement of the Kentucky statute; the controversy is between appellants and the Subcommittee, the Commonwealth Attorney being merely a nominal party because he has custody of the records.[1]

Appellants' present action is in substance a suit to quash the Subcommittee's subpoenas.[2] There can be no question that such an action could not normally be heard by a court of three judges. Nor would the

---

[1] In fact, at the hearing before the district court on December 5, 1967, the Commonwealth Attorney made the following Statement: "I would like to move the court to remove these materials from my custody, and of course as far as we are concerned it's dead now—the criminal prosecution—and we really have no reason that I know of to keep these materials in Pikesville. I would rather think the court might want to put them in the custody of the Marshal at this point" (Tr. 60).

[2] At the hearing below, counsel for appellants concluded his argument by stating: "[W]e move that the subpoenas of the McClellan Committee be quashed" (Tr. 85).

fact that the documents in question are in the hands of a State official compel the convening of a three-judge court. See *Rorick* v. *Board of Commissioners,* 307 U.S. 208; *Moody* v. *Flowers,* 387 U.S. 97, 102. Thus, there was no occasion for the three judges who had heard the injunctive proceeding to pass on appellants' objection to the Subcommittee's subpoenas.

Since appellants' application to invalidate the Subcommittee's subpoenas is, in any real sense, completely independent of their original action to restrain the enforcement of the Kentucky sedition law, this case is clearly distinguishable from the situation before the Court in *Bibb County Board of Education* v. *United States,* 389 U.S. 215, on which appellants rely.[3] In that case a three-judge court which had been

[3] Appellants cite a number of cases for the proposition that, once a three-judge court is properly convened, it has the jurisdiction to determine all questions in the case (Jurisdictional Statement, p. 36). However, as was pointed out in *Brashear,* all that these cases hold is that a three-judge court "has jurisdiction to determine every question involved in the litigation pertaining to the prayer for an injunction, in order that a single lawsuit may afford final and authoritative decision of the controversy between the parties" (312 U.S. at 625 n. 5). As noted above, the questions here presented do not pertain to the prayer for relief against the Kentucky sedition statute, and the controversy here is not between the same parties as the controversy which required the convening of a three-judge court.

Appellants also argue that because the documents involved are in the custody of the three-judge court, no other court would have jurisdiction to enter an order affecting them. However, a single district judge and a three-judge district court are not separate courts in the same sense that State and federal courts are separate. Compare *United States* v. *Bank of New York Co.,* 296 U.S. 463 (federal court may not entertain suit to dispose of assets in custody of State court). It is clear from *Commission* v.

convened to consider a suit to enjoin State officials from enforcing State statutes designed to prevent desegregation of schools had ordered the State officials to submit a Statewide desegregation plan. When the Bibb County Board of Education refused to cooperate with the State officials in their efforts to comply with the court's order, the court granted a motion to join Bibb County as a defendant and ordered it to desegregate. Thus, the decree as to Bibb County was clearly ancillary to the proceedings against the State officials since it was necessary to accomplish the essential purpose for which the court had been convened—to enjoin on a Statewide basis the operation of State laws designed to prevent desegregation. Here, on the other hand, the essential purpose in convening the three-judge court was accomplished when the State was enjoined from prosecuting appellants under the sedition statutes. The question of the validity of the Subcommittee's subpoenas is a discrete issue.

Finally, we cannot agree with appellants that, if this Court does not have jurisdiction on direct appeal, it should exercise its extraordinary power under 28 U.S.C. 1254(1) to issue a writ of certiorari before judgment in the court of appeals. We question whether this case has the type of "imperative public importance" which, in the past, has prompted this

---

Brashear Lines, *supra*, that when the purpose for which the two additional judges were called has been fulfilled, a single judge can dispose of remaining questions in the lawsuit, even though these questions would normally be decided by the same "court" which heard the original suit.

Court to take a case before judgment in a court of appeals. See Rule 20 of this Court; compare *Youngstown Co.* v. *Sawyer,* 343 U.S. 579; *United States* v. *United Mine Workers,* 330 U.S. 258; *Ex parte Quirin,* 317 U.S. 1.[4] While expedition is in the government's interest, we cannot say that this case meets the standards previously applied by this Court in adopting that extraordinary procedure.[5]

CONCLUSION

For the reasons stated, the appeal should be dismissed for want of jurisdiction.[6]

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1968.

---

[4] It should be noted that while appellants have filed a protective notice of appeal, as of the date of the filing of this memorandum, appellants have not docketed the case in the court of appeals—a prerequisite to the exercise of this Court's power to review before judgment in the court of appeals. Stern & Gressman, *Supreme Court Practice* (3d ed.) at 19. This defect, of course, could be easily remedied.

[5] There is no reason to believe that a resort to the normal appellate process will result in undue delay. The court of appeals can be expected to take reasonable action to see that this matter is handled expeditiously. Cf. *Aaron* v. *Cooper,* 357 U.S. 566.

[6] Under this Court's order of January 29, 1968, the stay automatically expires on such a dismissal. However, appellants will then be able to petition the court of appeals for appropriate relief *pendente lite.*

U.S. GOVERNMENT PRINTING OFFICE: 1968

PREME COURT, U. S.

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1113

MAR 6 1968
JOHN F. DAVIS, CLERK

ALAN McSURELY, MARGARET McSURELY, SOUTHERN CONFERENCE EDUCATIONAL FUND, INC., THE NATIONAL CONFERENCE FOR NEW POLITICS, and VIETNAM SUMMER, *Appellants,*

and

JOSEPH MULLOY, *Intervenor,*

—against—

THOMAS B. RATLIFF, Commonwealth's Attorney for the 35th Judicial District, Pike County, Kentucky; PERRY A. JUSTICE, Sheriff of Pike County, Kentucky; GROVER ATKINS, Jailer of Pike County, Kentucky; and ROBERT L. MATTHEWS, Attorney General for the Commonwealth of Kentucky, *Appellees*

and

UNITED STATES OF AMERICA, *Intervenor.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY, PIKEVILLE DIVISION

REPLY TO MOTION TO DISMISS

DAN JACK COMBS,
207 Carolina Avenue,
Pikeville, Kentucky.

ARTHUR KINOY,
WILLIAM B. KUNSTLER,
511 Fifth Avenue,
New York, New York, 10017.

MORTON STAVIS,
744 Broad Street,
Newark, New Jersey, 07102.

Attorneys for Appellants.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1113

ALAN McSURELY, MARGARET McSURELY, SOUTHERN CONFERENCE EDUCATIONAL FUND, INC., THE NATIONAL CONFERENCE FOR NEW POLITICS, and VIETNAM SUMMER, *Appellants,*

and

JOSEPH MULLOY, *Intervenor,*

—against—

THOMAS B. RATLIFF, Commonwealth's Attorney for the 35th Judicial District, Pike County, Kentucky; PERRY A. JUSTICE, Sheriff of Pike County, Kentucky; GROVER ATKINS, Jailer of Pike County, Kentucky; and ROBERT L. MATTHEWS, Attorney General for the Commonwealth of Kentucky, *Appellees*

and

UNITED STATES OF AMERICA, *Intervenor.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY, PIKEVILLE DIVISION

REPLY TO MOTION TO DISMISS

1. The Government now takes the position that this Court does not have jurisdiction to hear this appeal under 28 U.S.C. § 1253 because the three-judge court should not

have heard the matter as to the subpoenas. We observe at the outset that this is a radical change of position on the part of the Government.

We call the Court's attention to the Solicitor General's first submission in this case. In his memorandum in response to appellants' application for emergency relief filed on November 2, 1967, the Solicitor General stated the following:

> "In light of the above we suggest the following disposition which is designed to protect the vital interests of the committee and at the same time to afford applicants the opportunity to present promptly to the district court whatever defenses they believe they have to offer: that the Circuit Justice enter an order directing (1) that the seized documents be retained by their present custodian or by the clerk of the district court pending further proceedings in that court; (2) that this relief be conditioned upon the applicants filing in the district court within five days of the Circuit Justice's order any and all objections which they have to the validity of the subpoena; and (3) that this order shall remain effective until further order of the district court ruling upon such objections."

It will be noted that there was no hint at the time that the "District Court" was anything other than the then sitting three-judge court. Moreover, subsequently, on November 24, 1967, the Government formally moved to intervene before this very same three-judge court (appendix to jurisdictional statement, 98a). And even in its response to appellants' second application for emergency relief the Government stated, "We assume, for present purposes, that appeal lies directly to this Court." (Footnote 1.)

We do not mean to suggest that jurisdiction can be conferred on the Court by the Solicitor General; we do, however, point out that his position now is contrary to his earlier actions.

2. The Government rests its contention that there is no jurisdiction upon *Commission* v. *Brashear Lines*, 312 U. S. 621. That case is clearly distinguishable:

a) In *Brashear* the duties of the three-judge court "had been fully performed" before it was presented with the issue of damages. That is hardly the case here. In the instant case the District Court at the time it was confronted with the subpoena still had pending before it the issue with which it was originally presented, i.e., the return of the documents. Thus it had not "fully performed" its three-judge court duties.

b) In *Brashear* the court emphasized the wide gulf between the injunctive relief to which 28 U.S.C. §2281 is addressed and a claim for damages. But the relief sought here—the return of the documents—has from the very first application for judicial relief as set forth in the complaint, called for invocation of the injunctive power of the court (jurisdictional statement, appendix F-133a) and the motion upon which the lower court was asked to act (*ibid.*, appendices D-1 and D-6, 6a to 9a) likewise sought injunctive relief.

3. The Government suggests that the present proceeding is "in any real sense completely independent of the original action" and on that basis it would distinguish the *Bibb County* case, 389 U. S. 215. It argues that in *Bibb* the issue remained "ancillary" to the original basis for convening the three-judge court "since it was necessary to accomplish the essential purpose for which the court had been convened" (Government's motion to dismiss, p. 7). The Gov-

ernment then in effect argues that the present issue is really entirely separate from and wholly unrelated to the basis of the original proceeding.

That is hardly the case. One of the main issues to be presented on the appeal is whether, regardless of its form and content, any subpoena is effectively servable upon a court officer holding documents which have been judicially determined to have been illegally seized (jurisdictional statement p. 20). This issue has to do directly with the enforcement of the State statute and the consequent illegal seizure thereunder. This is not a "discreet" issue separate and apart from the seizure; this is indeed a specific consequence of the seizure. Appellants on this point contend very simply that there is only one possible consequence of an illegal seizure and that is a return of the documents to their rightful owners.

So, too, the issue of whether a subpoena composed on the basis of information obtained from unauthorized inspection of illegally seized documents permitted by the very parties who committed the illegal seizure. This again involves the consequences of conduct by officers who illegally seized documents.

In short, on these issues, at least, the contending parties remain, as they always have been the appellants and the State officials of Kentucky, and the form and content of the subpoena or the powers of the McClellan Committee are quite irrelevant. And indeed, exactly as in *Bibb*, the relief sought here is "clearly ancillary to the proceedings against the State officials since it was necessary to accomplish the essential purpose for which the court had been convened" (to borrow the Government's own language, motion to dismiss, p. 7), i.e., to enjoin the prosecution and obtain the return of the documents.

4. Finally, we suggest that the Solicitor General has proposed a far too limited scope for the application of Rule 20 of the Rules of the Court. While doubtless the Rule has been applied in extraordinary cases such as *Youngstown Co.* v. *Sawyer,* 343 U. S. 579, and *United States* v. *United Mine Workers,* 330 U. S. 258, it has also been applied in cases of somewhat less dramatic importance where other considerations have suggested that the Court exercise its undoubted power to grant *certiorari* before the judgment of the Circuit Court. Thus, both *Stainbeck* v. *Mo Hock Ke Lok Po,* 336 U. S. 368, and *Turner* v. *City of Memphis,* 369 U. S. 350, involved cases which were certainly not of extraordinary importance if measured against *Youngstown* and *United Mine Workers,* but nevertheless the Court exercised the discretion here sought to be invoked. The considerations applicable here may be stated as follows:

a) There is no question of the importance of the issues; even the Solicitor General assumes that the decision of the Court to grant the stay implies a determination that the questions are substantial.

b) There is no question that the issues are of sufficient novelty as to call for ultimate determination by this Court, and it does not appear that any prior consideration of the case by a Circuit Court will serve further to clarify the issues.

c) The case does present unusual problems of the relationship between the functioning of a Senate Committee and State officials, the speedy determination of which would seem to be at least as important as the Court must have felt was called for in *Wilson* v. *Girard,* 354 U. S. 524, where the Court did not wish to delay a determination of jurisdiction to try American soldiers stationed in Japan.

In his first submission to the Court the Solicitor General emphasized the need for speed: "We stress at the outset that the Senate Committee regards it as highly important to the conduct of its investigation that the papers in question be made available to it without delay."

d) Probably more so than any other case in which the Court has even considered exercising its Rule 20 power, this Court has already dealt extensively with the factual and legal issues—upon the two applications for a stay—so that economy of judicial effort clearly calls for this Court's hearing this case at this time.

e) Even the Government would have to concede that the issue under 28 U.S.C. §1253 is, to say the least, abtruse and not likely to recur. If the Court finds it appropriate not to adjudicate that question, the avenue through Rule 20 permits an efficient method of considering the substantive issues in the case without making it necessary to determine the 28 U.S.C. § 1253 question.

Respectfully submitted,

DAN JACK COMBS,
207 Carolina Avenue,
Pikeville, Kentucky.

ARTHUR KINOY,
WILLIAM B. KUNSTLER,
511 Fifth Avenue,
New York, New York, 10017.

MORTON STAVIS,
744 Broad Street,
Newark, New Jersey, 07102.

Attorneys for Appellants.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

McSURELY ET AL. *v.* RATLIFF ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY.

No. 1113. Decided March 18, 1968.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. The stay heretofore granted is continued for 30 days in order to afford the appellants an opportunity to apply to the United States Court of Appeals for the Sixth Circuit for a stay. If such timely application is made, the stay entered by this Court shall remain in effect until the Court of Appeals acts on that application.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that probable jurisdiction should be noted and the case set for oral argument.